



INTERNATIONAL
COMMISSION
OF JURISTS

**INTERNATIONAL PRINCIPLES ON
THE INDEPENDENCE AND ACCOUNTABILITY
OF JUDGES, LAWYERS AND PROSECUTORS**

A PRACTITIONERS' GUIDE

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Foreword

The judicial system in a country is central to the protection of human rights and freedoms. Courts play a major role in ensuring that victims or potential victims of human rights violations obtain effective remedies and protection and that perpetrators of human rights violations are brought to justice. They also ensure that anyone suspected of a criminal offence receives a fair trial according to international standards and that the executive and legislative branches of government act according to international human rights and the rule of law.

The ICJ has accumulated a quarter century of experience working with justice systems to ensure their independence and active protection of human rights. Through its Centre for the Independence of Judges and Lawyers (CIJL), the ICJ has sought to develop practical mechanisms to promote and protect judicial and legal independence, including the UN Basic Principles on the Independence of the Judiciary and on the Role of Lawyers.

This Practitioners' Guide provides practical insight on the use of international principles on the independence and accountability of judges, lawyers and prosecutors. It also presents all the relevant international standards on the topic, thus updating the compilation published by the ICJ in 1990.

The Guide is meant to serve as a human rights policy and advocacy tool for legal practitioners, policy-makers, training institutions and human rights organisations to help them conduct their activities, from judicial training to the adoption of laws and policies in accordance with international standards.

A handwritten signature in black ink, reading "Nicholas Howen". The signature is written in a cursive style and is positioned above a horizontal line.

Nicholas Howen
Secretary General

Explanatory note

Part one of this guide is organised into three sections, **judges**, **lawyers** and **prosecutors**, and provides an analysis of the standards relating to each. Part two of the guide consists of a compilation of standards on the independence and accountability of the judiciary, the legal profession and prosecutors. Standards on the right to a fair trial are also included. Relevant standards can be found according to bodies responsible for them and regions where they apply. They are further categorised according to standards relating *specifically* to independence and accountability and then treaty and non-treaty norms that have a bearing on this issue.

In each section, cases and instruments are included in *italics*. Certain parts of the guide, mainly case law and concluding observations of human rights bodies, are highlighted to provide the reader with concrete examples of what is explained in the text. Certain provisions that are of particular relevance are also included in *italics*.

“The administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to the processes of democracy and sustainable development”.¹

INTRODUCTION

The judicial system in a country is central to the protection of human rights and freedoms. Courts play a major role in ensuring that victims or potential victims of human rights violations obtain effective remedies and protection, that perpetrators of human rights violations are brought to justice and that anyone suspected of a criminal offence receives a fair trial according to international standards. The judicial system is an essential check and balance on the other branches of government, ensuring that laws of the legislative and the acts of the executive comply with international human rights and the rule of law.

This crucial role has been highlighted by all inter-governmental human rights systems. The United Nations General Assembly has repeatedly stated that “the rule of law and the proper administration of justice [...] play a central role in the promotion and protection of human rights”² and that “the administration of justice, including law enforcement and prosecutorial agencies and, especially, an independent judiciary and legal profession in full conformity with applicable standards contained in international human rights instruments, are essential to the full and non-discriminatory realization of human rights and indispensable to democratization processes and sustainable development”.³

¹ *Vienna Declaration and Programme of Action*, adopted by the World Conference on Human Rights in Vienna on 25 June 1993, para. 27

² See, for example, resolutions 50/181 of 22 December 1995 and 48/137 of 20 December 1993, entitled "Human rights in the administration of justice".

³ *Ibid.*

The United Nations General Secretary General has emphasised the fact that “[i]ncreasingly the importance of the rule of law in ensuring respect for human rights, and of the role of judges and lawyers in defending human rights, is being recognized”.⁴

The Inter-American Court of Human Rights has said that “[g]uaranteeing rights involves the existence of suitable legal means to define and protect them, with intervention by a competent, independent, and impartial judicial body, which must strictly adhere to the law, where the scope of the regulated authority of discretionary powers will be set in accordance with criteria of opportunity, legitimacy, and rationality”.⁵ Similarly, the Inter-American Commission on Human Rights has pointed out that “the independence of the judiciary is an essential requisite for the practical observance of human rights”.⁶ The Commission also considered that “[t]he right to a fair trial is one of the fundamental pillars of a democratic society. This right is a basic guarantee of respect for the other rights recognized in the Convention, because it limits abuse of power by the State”.⁷

Independence and impartiality

The existence of independent and impartial tribunals is at the heart of a judicial system that guarantees human rights in full conformity with international human rights law. The constitution, laws and policies of a country must ensure that the justice system is truly independent from other branches of the State. Within the justice system, judges, lawyers and prosecutors must be free to carry out their professional duties without political interference and must be protected, in law and in practice, from attack, harassment or persecution as they carry out their professional activities in the defence of human rights. They should in turn be active protectors of human rights, accountable to the people and

⁴ *Strengthening of the rule of law - Report of the Secretary General to the United Nations General Assembly*, UN document A/57/275, para. 41.

⁵ *Legal status and human rights of the child*, Advisory Opinion of the Inter-American Court of Human Rights (IACtHR) OC-17/2002, 28 August 2002, para. 120.

⁶ *The Situation of Human Rights in Cuba: Seventh Report*, OAS document OEA/Ser.L/V/II.61, doc. 29, rev. 1, 1983, Chapter IV, para. 2.

⁷ Report N° 78/02, Case 11.335, *Guy Malary vs. Haiti*, 27 December 2002, para 53.

must maintain the highest level of integrity under national and international law and ethical standards.

However, judges, lawyers and prosecutors are often unable to fulfil their role as protectors of human rights because they lack sufficient professional qualifications, training and resources, including an understanding of international human rights law and how to apply it domestically.

While judges, lawyers and prosecutors enjoy the same human rights as any other human being, they are also specially protected because they are the main guarantors of those human rights for the rest of the population. If judges cannot assess the facts and apply the law, both national and international, the justice system becomes arbitrary. If lawyers cannot communicate freely with their clients, the right of defence and the principle of equality of arms, which requires both parties to a criminal proceeding to be treated in the same manner, are not upheld. If prosecutors are not physically protected when their lives are in danger due to their work, their duty to prosecute is impinged upon.

This special protection, however, carries special responsibilities. The principle of independence of judges is not intended to grant them personal benefits; its rationale is to protect individuals against abuses of power. Consequently, judges cannot arbitrarily decide cases according to their own personal preferences, but must apply the law to the facts. In the case of prosecutors, their duty is to investigate and prosecute all violations of human rights irrespective of who perpetrated them. In turn, lawyers must at all times carry out their work in the interest of their clients.

Therefore, judges, lawyers and prosecutors are essential to the right to a fair trial. Unless all of them are able carry out their functions appropriately, the rule of law and the right to a fair trial are seriously endangered.

The right to a fair trial in international law: universal and regional instruments

All general universal and regional human rights instruments guarantee the right to a fair hearing in judicial proceedings (criminal, civil, disciplinary and administrative matters) before an independent and impartial court or tribunal.

Treaties

A treaty is an international written agreement concluded between States and/or intergovernmental organisations and governed by international law.⁸ The name the parties give to a treaty is of no relevance here (Covenant, Convention, Treaty, Protocol, etc.); what matters is the content and the language of the treaty, as well as the parties' intention to be bound by it. A treaty always contains language by which the signing parties agree on the legally binding character of the agreement.

The parties to a treaty are obligated under international law to fulfil and implement the provisions of the treaty in good faith, and a State cannot invoke the provisions of its internal law as justification for its failure to perform a treaty.⁹

The *International Covenant on Civil and Political Rights* (ICCPR), signed and ratified by 154 States, stipulates in article 14(1) that "all persons shall be equal before the courts and tribunals" and that "in the determination of any criminal charge against him, or of his rights and obligations in a suit of law, everyone shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law". The Human Rights Committee, the body in charge of monitoring State compliance with the Covenant, has unequivocally stated that the right to be tried by an independent and impartial tribunal "is an absolute right that may suffer no exception".¹⁰ The Committee has also

⁸ See Article 1 of the Vienna Convention on the Law of Treaties and Article 2 of the Vienna Convention on the Law of Treaties between States and International Organisations or between International Organisations.

⁹ Articles 26 and 27 of the Vienna Convention on the Law of Treaties.

¹⁰ Communication No. 263/1987, *M. Gonzalez del Río v. Peru* (Views adopted on 28 October 1992), UN document CCPR/C/46/D/263/1987 (Jurisprudence), para. 5.2.

specified that even in time of war or during a state of emergency, “only a court of law may try and convict a person for a criminal offence”.¹¹ It is thus a right that is applicable in all circumstances and to all courts, whether ordinary or special.

Similarly, article 18 (1) of the *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families* states that “[m]igrant workers and members of their families [...] shall be entitled to a fair and public hearing by a competent, independent and impartial tribunal established by law”.

On a regional level, article 8 (1) of the *American Convention on Human Rights* provides that “every person has the right to a hearing, with due guarantees and within a reasonable time, by a competent, independent, and impartial tribunal, previously established by law, in the substantiation of any accusation of a criminal nature made against him or for the determination of his rights and obligations of a civil, labour, fiscal, or any other nature”.

With different wording but in similar terms, article 7(1) of the *African Charter on Human and Peoples' Rights* provides that “every individual shall have the right to have his cause heard”, a right that comprises “the right to be presumed innocent until proved guilty by a competent court or tribunal” and “the right to be tried within a reasonable time by an impartial court or tribunal”. This article must be read in conjunction with article 26 of the Charter, which establishes that the States parties “shall have the duty to guarantee the independence of the Courts”. The African Commission on Human and Peoples' Rights has said that article 7 “should be considered non-derogable” since it provides “minimum protection to citizens”.¹²

¹¹ Human Rights Committee, General Comment No. 29 - States of Emergency (article 4), CCPR/C/21/Rev.1/Add.11, 31 August 2001, para 16.

¹² African Commission on Human and Peoples' Rights, *Civil Liberties Organisation, Legal Defence Centre, Legal Defence and Assistance Project v. Nigeria*, Communication No. 218/98, decision adopted during the 29th Ordinary Session, 23 April – 7 May 2001, para. 7.

Article 6 (1) of the *European Convention on Human Rights* specifies that “in the determination of his civil rights and obligations or of any criminal charge against him, everyone is entitled to a fair and public hearing within a reasonable time by an independent and impartial tribunal established by law”.

The right to receive a fair trial is also recognised in international humanitarian law. Article 75 (4) of the *First Protocol to the Geneva Conventions* stipulates that “No sentence may be passed and no penalty may be executed on a person found guilty of a penal offence related to the armed conflict except pursuant to a conviction pronounced by an impartial and regularly constituted court respecting the generally recognized principles of regular judicial procedure”.¹³

Declaratory instruments

Declaratory instruments are not binding in a legal sense, but establish widely recognised standards on a number of human rights topics. Generally these instruments, particularly those adopted in the framework of the United Nations, reflect international law.

Many of these instruments contain provisions that are mere re-statements of those contained in treaties and, in some cases, customary international law. For example, Principle 1 of the *UN Basic Principles on the Role of Lawyers* (on the right to legal representation) simply restates the right contained in Article 14, paragraph 3 (d) of the ICCPR.

A number of declaratory instruments contain provisions on the right to a fair trial before an independent and impartial tribunal. The *Universal Declaration on Human Rights*, adopted by the UN General Assembly in 1948, recognises that “Everyone is entitled in

¹³ These principles include the following: “(a) the procedure shall provide for an accused to be informed without delay of the particulars of the offence alleged against him and shall afford the accused before and during his trial all necessary rights and means of defence; (b) no one shall be convicted of an offence except on the basis of individual penal responsibility; [...] (d) anyone charged with an offence is presumed innocent until proved guilty according to law; and (e) anyone charged with an offence shall have the right to be tried in his presence”.

full equality to a fair and public hearing by an independent and impartial tribunal, in the determination of his rights and obligations and of any criminal charge against him". Guideline IX of the *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*¹⁴ stipulates that "[a] person accused of terrorist activities has the right to a [...] hearing [...] by an independent, impartial tribunal established by law". Article 47 of the *Charter of Fundamental Rights of the European Union* states that "[e]veryone is entitled to a [...] hearing [...] by an independent and impartial tribunal previously established by law". Article XXVI of the *American Declaration of the Rights and Duties of Man* lays down that "[...] Every person accused of an offence has the right [...] to be tried by courts previously established in accordance with pre-existing laws".

The right to a fair trial before an independent and impartial tribunal is not only recognised in treaties but it is also part of customary international law. Therefore, those countries that have not acceded to or ratified these treaties are still bound to respect this right and arrange their judicial systems accordingly.

The principle of the natural judge

The principle of the 'natural judge' (*juez natural*) constitutes a fundamental guarantee of the right to a fair trial. This principle means that no one can be tried other than by an ordinary, pre-established, competent tribunal or judge. As a corollary of this principle, emergency, *ad hoc*, 'extraordinary', *ex post facto* and special courts are forbidden. This ban, however, should not be confused with the question of specialist jurisdictions. Although the principle of the 'natural judge' is based on the dual principle of equality before the law and the courts, which means that laws should not be discriminatory or applied in a discriminatory way

¹⁴ *Guidelines of the Committee of Ministers of the Council of Europe on human rights and the fight against terrorism*, adopted by the Committee of Ministers on 11 July 2002 at the 804th Session of the Council of Europe Ministers' Deputies.

by judges, nevertheless, as the Human Rights Committee has pointed out, "[t]he right to equality before the law and to equal protection of the law without any discrimination does not make all differences of treatment discriminatory".¹⁵ However, as the Committee has repeatedly stated, a difference in treatment is only acceptable if it is founded on reasonable and objective criteria.¹⁶

The Commission on Human Rights has reiterated, in several of its resolutions, the principle of the natural judge. For example, in Resolution 1989/32 the Commission recommended that States should take account of the principles contained in the *Draft Universal Declaration on the Independence of Justice*, also known as the *Singhvi Declaration*.¹⁷ Article 5 of the *Declaration* stipulates that: "(b) no *ad hoc* tribunal shall be established to displace jurisdiction properly vested in the court; (c) Everyone shall have the right to be tried with all due expedition and without undue delay by ordinary courts or judicial tribunal under law subject to review by the courts; [...] (e) In such times of emergency, the State shall endeavour to provide that civilians charged with criminal offences of any kind shall be tried by ordinary civilian courts". It is also worth highlighting two resolutions on the "integrity of the judicial system," in which the Commission reiterated that "everyone has the right to be tried by ordinary courts or tribunals using duly established legal procedures and that tribunals that do not use such procedures should not be created to displace the jurisdiction belonging to the ordinary courts or judicial tribunals".¹⁸

- The existence of specialist courts or jurisdictions is widely accepted and is predicated on the specificity of the subject matter. For example, specialist jurisdictions exist in many legal systems to deal with labour,

¹⁵ Communication 172/1984, *S. W. M. Brooks v. the Netherlands*, (Views adopted on 9 April 1987), UN document Supp. 40 (A/42/40) at 139, annex VIII.B, para. 13. See also, among others: Communication No. 182/1984, *Zwaan-de-Vries v. The Netherlands*, (Views adopted on 9 April 1987), UN document Supp. No. 40 (A/42/40) at 160, annex VIII.B; Communication 196/1985, *Ibrahima Gueye and others v. France* (Views adopted on 3 April 1989), UN document CCPR/C/35/D/196/1985; and Communication 516/1992, *Alina Simunek v. The Czech Republic* (Views adopted on 19 July 1995), UN document CCPR/C/54/D/516/1992.

¹⁶ *Ibid.*

¹⁷ The *Singhvi Declaration* formed the basis for the United Nations' Basic Principles on the Independence of the Judiciary.

¹⁸ Operative paragraph N° 2 of Resolutions N° 2002/37 of 22 April 2002 and N° 2003/39 of 23 April 2003.

administrative, family and commercial matters. In addition, in criminal matters, as an exceptional case, the existence of specialist jurisdictions for certain parties, such as indigenous peoples and juveniles, is recognized under international law and is predicated on the specificity of those being prosecuted.

The Human Rights Committee has not developed significant jurisprudence on the principle of the 'natural judge'. However, it has addressed the question of 'extraordinary' or special courts. Traditionally, it has not seen special courts as "intrinsically incompatible with article 14(1) of the Covenant".

- In General Comment N° 13, adopted in 1984, the Human Rights Committee took the view that: "The provisions of article 14 apply to all courts and tribunals within the scope of that article whether ordinary or specialized. The Committee notes the existence, in many countries, of military or special courts which try civilians. This could present serious problems as far as the equitable, impartial and independent administration of justice is concerned. Quite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice. While the Covenant does not prohibit such categories of courts, nevertheless the conditions which it lays down clearly indicate that the trying of civilians by such courts should be very exceptional and take place under conditions which genuinely afford the full guarantees stipulated in article 14. [...] If States parties decide in circumstances of a public emergency as contemplated by article 4 to derogate from normal procedures required under article 14, they should ensure that such derogations do not exceed those strictly required by the exigencies of the actual situation, and respect the other conditions in paragraph 1 of article 14".¹⁹

In recent years the Committee has repeatedly expressed its concern at the use of special courts²⁰ and has, on several occasions,

¹⁹ Human Rights Committee, General Comment N° 13: Equality before the courts and tribunals and the right to a fair and public hearing by a competent, independent and impartial tribunal established by law (article 14 of the Covenant), para. 4, UN document HR1/GEN/1/Rev.3, p.17.

²⁰ Communication No. 328/1988, *Roberto Zelaya Blanco v. Nicaragua* (Views adopted on 20 July 1994), UN document CCPR/C/51/D/328/1988. See also the Concluding Observations of the Human Rights Committee on Nigeria, UN documents CCPR/C/79/Add.65 and CCPR/C/79/Add.64; Concluding Observations of the Human Rights Committee on Morocco, UN documents A/47/40, paras. 48-79 and CCPR/C/79/Add.113, para. 18; Concluding Observations of the Human Rights Committee on France, UN document CCPR/C/79/Add.80, para. 23; Concluding Observations of the Human Rights Committee on Iraq, UN document

recommended that such courts be abolished.²¹ The Committee has also seen the abolition of special courts as a positive contributing factor in achieving national implementation of the ICCPR.²²

- The Committee has recommended Nigeria to abrogate "all the decrees establishing special tribunals or revoking normal constitutional guarantees of fundamental rights or the jurisdiction of the normal courts".²³
- In the case of Nicaragua, the Committee found that "proceedings before the *Tribunales Especiales de Justicia* [special *ad hoc* tribunals] did not offer the guarantees of a fair trial provided for in article 14 of the Covenant".²⁴

The Human Rights Committee has specified that special tribunals must conform to the provisions of Article 14 of the ICCPR. It nevertheless went on to say that "[q]uite often the reason for the establishment of such courts is to enable exceptional procedures to be applied which do not comply with normal standards of justice".²⁵

The European Court of Human Rights and the European Commission of Human Rights have ruled on the right to be tried by a tribunal established by law, even though they have not referred specifically to the principle of the "natural judge".

- In its report on the case of *Zand v. Austria*, the European Commission took the view that the purpose of the clause in article 6(1) [of the European Convention on Human Rights] requiring tribunals to be established by law was to ensure that, in a democratic society, organization of the judiciary was not left to the discretion of the executive but should be regulated by a law of parliament. However,

CCPR/C/79/Add.84, para. 15; and Concluding Observations of the Human Rights Committee on Egypt, UN document A/48/40, para. 706.

²¹ See, for example, the Concluding Observations of the Human Rights Committee on Gabon, UN document CCPR/CO/70/GAB, para. 11.

²² See, for example, the Concluding Observations of the Human Rights Committee on Guinea, UN document CCPR/C/79/Add.20, para 3, and the Concluding Observations of the Human Rights Committee on Senegal, UN document CCPR/C/79/Add.10, para 3.

²³ Preliminary Concluding Observations of the Human Rights Committee on Nigeria, UN document CCPR/C/79/Add.64, para. 11.

²⁴ Communication No. 328/1988, *Roberto Zelaya Blanco v. Nicaragua*, *op. cit.*, para. 10.4.

²⁵ Human Rights Committee, General Comment 13, *op. cit.*, para. 4.

that did not mean that the delegation of powers was in itself unacceptable in the case of matters related to the organization of the judiciary. Article 6(1) did not require that, in this field, the legislature should regulate every detail by means of a formal law as long as it at least established the overall framework of the judiciary.²⁶

Military tribunals

The existence of military criminal tribunals raises serious issues related to the right to a fair trial. The Human Rights Committee has on several occasions recommended in its country observations that legislation be codified so that civilians are tried by civilian courts and not by military tribunals.²⁷

- The Human Rights Committee expressed concern about the "broad scope of the jurisdiction of military courts in Lebanon, especially its extension beyond disciplinary matters and its application to civilians. It [also expressed concern] about the procedures followed by these military courts, as well as the lack of supervision of the military courts' procedures and verdicts by the ordinary courts. The [Committee recommended that] the State party should review the jurisdiction of the military courts and transfer the competence of military courts, in all trials concerning civilians and in all cases concerning the violation of human rights by members of the military, to the ordinary courts."²⁸

²⁶ Report of 12 October 1978, Case of *Primncvo Zand v. Austria*, Request N° 7360/76, para. 70.

²⁷ See, for example, the Concluding Observations of the Human Rights Committee on Peru, UN document CCPR/C/79/Add.67, para. 12; Concluding Observations of the Human Rights Committee on Uzbekistan, UN document CCPR/CO/71/UZB, para. 15; Concluding Observations of the Human Rights Committee on the Syrian Arab Republic, UN document CCPR/CO/71/SYR, para. 17; Concluding Observations of the Human Rights Committee on Kuwait, UN document CCPR/CO/69/KWT, para. 10; Concluding Observations of the Human Rights Committee on Egypt CCPR/C/79/Add.23, para. 9; UN document CCPR/CO/76/EGY, para. 16; Concluding Observations of the Human Rights Committee on the Russian Federation, UN document CCPR/C/79/Add.54, para. 25; Concluding Observations of the Human Rights Committee on Slovakia, UN document CCPR/C/79/Add.79, para. 20; Concluding Observations of the Human Rights Committee on Venezuela, UN document CCPR/C/79/Add.13, para. 8; Concluding Observations of the Human Rights Committee on Cameroon, UN document CCPR/C/79/Add.116, para. 21; Concluding Observations of the Human Rights Committee on Algeria, UN document CCPR/C/79/Add.1, para. 5; Concluding Observations of the Human Rights Committee on Poland, UN document CCPR/C/79/Add.110, para. 21; and Concluding Observations of the Human Rights Committee on Chile, UN document CCPR/C/79/Add.104, para. 9.

²⁸ Concluding Observations of the Human Rights Committee on Lebanon, UN document CCPR/C/79/Add.78, para. 14.

- In the case of Peru, the Committee considered that the prosecution of civilians by military tribunals was incompatible with Article 14 of the ICCPR, because it “is not consistent with the fair, impartial and independent administration of justice”.²⁹

In the view of the Special Rapporteur on the independence of judges and lawyers: "In regard to the use of military tribunals to try civilians, international law is developing a consensus as to the need to restrict drastically, or even prohibit, that practice".³⁰

The United Nations Working Group on Arbitrary Detention has laid down clear rules on military tribunals, when it considered that "if some form of military justice is to continue to exist, it should observe four rules:

- It should be incompetent to try civilians;
- It should be incompetent to try military personnel if the victims include civilians;
- It should be incompetent to try civilians and military personnel in the event of rebellion, sedition or any offence that jeopardizes or involves risk of jeopardizing a democratic regime;
- It should be prohibited from imposing the death penalty under any circumstances".³¹

The European Court of Human Rights has also referred to military judges and tribunals in numerous occasions. According to the Court, military judges cannot be considered independent and impartial due to the nature of the body they belong to.

- In *Findlay v. The United Kingdom*, the European Court found that the applicant's court martial was neither independent nor impartial because its members were subordinate in rank to the convening officer, who also acted as “confirming officer” and who could modify whatever sentence was handed down.³²

²⁹ Concluding Observations of the Human Rights Committee on Peru, UN document CCPR/CO/70/PER, para. 11.

³⁰ Report of the Special Rapporteur on the independence of judges and lawyers on his mission to Peru, UN document E/CN.4/1998/39/Add.1, para. 78.

³¹ Report of the Working Group on Arbitrary Detention, UN document E/CN.4/1999/63, para. 80.

³² *Findlay v. The United Kingdom*, judgment of the European Court of Human Rights (ECtHR) of 25 February 1997, Series 1997-I, paras. 74-77. In *Incal v. Turkey*, the Court found that the presence of a military judge on the State Security Court was contrary to the principles of independence and impartiality, which are essential prerequisites

Generally speaking, the African Commission of Human and Peoples' Rights (ACHPR) has taken the view that "a military tribunal *per se* is not offensive to the rights in the Charter nor does it imply an unfair or unjust process." However, the Commission made the point that "military tribunals must be subject to the same requirements of fairness, openness, and justice, independence, and due process as any other process".³³ The ACHPR also considered that the fundamental question was to determine whether such courts met the standards of independence and impartiality required of any court.³⁴

The Inter-American Commission on Human Rights has stated that "citizens must be judged pursuant to ordinary law and justice and by their natural judges. Thus, civilians should not be subject to Military Tribunals".³⁵

- In its study on Terrorism and Human Rights, the Commission recalled that "the jurisprudence of the inter-American system has long denounced the creation of special courts or tribunals that displace the jurisdiction belonging to the ordinary courts or judicial tribunals and that do not use the duly established procedures of the legal process. This has included in particular the use of *ad hoc* or special courts or military tribunals to prosecute civilians for security offences in times of emergency, which practice has been condemned by this Commission, the Inter-American Court and other international authorities. The basis of this criticism has related in large part to the lack of independence of

for a fair trial. *Incal v. Turkey*, ECtHR judgment of 9 June 1998, Series 1998-IV, paras 67-73.

³³ Decision of May 2001, Communication 218/98 (Nigeria), para. 44.

³⁴ See the Decision of November 2000, Communication N° 223/98 (Sierra Leone); Decision of April 1997, Communication N° 39/90 (Cameroon); Decision of November 1999, Communication N° 151/96 (Nigeria); Decision of November 1999, Communication N° 206/97 (Nigeria); Decision of 1995, Communication N° 60/91 (Nigeria) para. 15; and Decision of 1995, Communication N° 87/93 (Nigeria). See also Principle L of the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of African Union, Maputo, 4 -12 July 2003.

³⁵ *Annual Report of the Inter-American Commission on Human Rights - 1997*, OAS document OEA/Ser.L/V/II.98, Doc. 6, Chapter VII, Recommendation 1 "The Commission recommends that the member States adopt measures to improve the administration of justice within their respective jurisdictions." With regard to the principle of the 'natural judge', see also: Report N° 50/00 of 13 April 2000, Case 11,298 *Reinaldo Figueredo Planchart v. Bolivarian Republic of Venezuela* and *Report on the Situation of Human Rights in Chile*, OAS document OEA/Ser.L/V/II.77.rev.1, Doc. 18.

such tribunals from the Executive and the absence of minimal due process and fair trial guarantees in their processes.”³⁶

The Inter-American Court of Human Rights, in the case of *Castillo Petruzzi et al. v. Peru*, adopted a clear and unequivocal position on the practice of trying civilians in military courts. In an *obiter dictum* contained in its judgment of 30 May 1999, the Court considered that the “basic principle of the independence of the judiciary is that every person has the right to be heard by regular courts, following procedures previously established by law”.³⁷

Although a trial by a special court or tribunal does not entail, *per se*, a violation of the right to receive a fair trial by an independent and impartial tribunal, an inextricable link can be found between the displacement of the natural jurisdiction and the unfairness of a given proceeding.

³⁶ Report on Terrorism and Human Rights, OAS document OEA/Ser.L/V/II.116, Doc. 5 rev. 1 corr., 22 October 2002, para. 230.

³⁷ Case of *Castillo Petruzzi et al. v. Peru*, IACtHR judgment of 30 May 1999, Series C No. 52, para. 128. See also Case of *Cantoral Benavides v. Peru*, IACtHR judgment of 18 August 2000, Series C No. 69, para. 112.

A. JUDGES

1. INDEPENDENCE

Overview

For a trial to be fair, the judge or judges sitting on the case must be independent. All international human rights instruments refer to a fair trial by “an **independent** and impartial tribunal”. The Human Rights Committee has repeatedly taken the view that the right to an independent and impartial tribunal is “an absolute right that may suffer no exception”.¹

Even though a person’s right to a fair trial may be respected in a particular case when a judge is independent, a State would be in breach of its international obligations if the judiciary were not an independent branch of power. Therefore, in this context, independence refers both to the individual judge as well as to the judiciary as a whole.

International standards

The *UN Basic Principles on the Independence of the Judiciary* lay out the requisite of independence in the first Principle:

*“The independence of the judiciary shall be guaranteed by the State and enshrined in the Constitution or the law of the country. It is the duty of all governmental and other institutions to respect and observe the independence of the judiciary”.*²

The Council of Europe’s *Recommendation on the Independence of Judges* states that the independence of judges must be guaranteed by inserting specific provisions in constitutions or other legislation and that “[t]he executive and legislative powers should ensure that

¹ Communication N° 263/1987, Case of *Miguel González del Río vs. Peru*, *op. cit.*, para. 5.2.

² United Nations Basic Principles on the Independence of the Judiciary, adopted by the Seventh United Nations Congress on the Prevention of Crime and the Treatment of Offenders held at Milan from 26 August to 6 September 1985 and endorsed by General Assembly resolutions 40/32 of 29 November 1985 and 40/146 of 13 December 1985. Hereinafter, *UN Basic Principles*.

judges are independent and that steps are not taken which could endanger the independence of judges”.³

The independence of the judiciary is also specifically recognised in other regional contexts, namely Africa and Asia-Pacific. In the case of Africa, it is worth highlighting the resolution on the respect and strengthening of the independence of the judiciary, adopted in 1999 by the African Commission on Human and People's Rights.⁴ In Asia-Pacific, the *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region* (the *Beijing Principles*) stipulate that the “Independence of the Judiciary requires that [it] decide matters before it in accordance with its impartial assessment of the facts and its understanding of the law without improper influences, direct or indirect, from any source”.⁵

Lastly, the *Universal Charter of the Judge*, an instrument approved by judges from all regions of the world, establishes that “The independence of the judge is indispensable to impartial justice under the law. It is indivisible. All institutions and authorities, whether national or international, must respect, protect and defend that independence.”⁶

The principle of separation of powers

The principle of an independent judiciary derives from the basic principles of the rule of law, in particular the principle of separation of powers. The Human Rights Committee has said that

³ Council of Europe, *Recommendation No. R (94) 12 of the Committee of Ministers to Member States on the Independence, Efficiency and Role of Judges*, 13 October 1994, Principle 2 (b).

⁴ Adopted in April 1996 at the 19th Session of the African Commission on Human and People's Rights.

⁵ Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, adopted by the Chief Justices of the LAWASIA region and other judges from Asia and the Pacific in 1995 and adopted by the LAWASIA Council in 2001, operative para. 3.a.

⁶ The Universal Charter of the Judge, approved by the International Association of Judges (IAJ) on 17 November 1999, article 1. The IAJ was founded in 1953 as a professional, non-political, international organisation, grouping not individual judges, but national associations of judges. The main aim of the Association, which encompasses 67 such national associations or representative groups, is to safeguard the independence of the judiciary, as an essential requirement of the judicial function and guarantee of human rights and freedom.

the principle of legality and the rule of law are inherent in the ICCPR.⁷ The Inter-American Court of Human Rights has also stressed that “there exists an inseparable bond between the principle of legality, democratic institutions and the rule of law”.⁸ According to this principle, the executive, the legislature and the judiciary constitute three separate and independent branches of government. Different organs of the State have exclusive and specific responsibilities. By virtue of this separation, it is not permissible for any branch of power to interfere into the others' sphere.⁹

The principle of the separation of powers is the cornerstone of an independent and impartial justice system.

- The Special Rapporteur on extrajudicial, summary or arbitrary executions and the Special Rapporteur on the independence of judges and lawyers have concluded that “[t]he separation of power[s] and executive respect for such separation is a *sine qua non* for an independent and impartial judiciary to function effectively”.¹⁰
- The Special Rapporteur on the independence of judges and lawyers has underscored that “the principle of the separation of powers [...] is the bedrock upon which the requirements of judicial independence and impartiality are founded. Understanding of, and respect for, the principle of the separation of powers is a *sine qua non* for a democratic State [...]”.¹¹ In a similar vein, he said that “the requirements of independent and impartial justice are universal and are rooted in both natural and positive law. At the international level, the sources of this law are to be found in conventional undertakings, customary obligations and general principles of law. [...] [T]he underlying concepts of judicial independence and impartiality [...] are 'general principles of law recognized by civilized nations' in the sense of Article 38 (1) (c) of the Statute of the International Court of Justice.”¹²

⁷ "General Comment N° 29 on article 4 of the *International Covenant on Civil and Political Rights*", *op. cit.*, para. 16.

⁸ *Habeas Corpus in Emergency Situations* (arts. 27.2, 25.1 and 7.6 American Convention on Human Rights), IACtHR Advisory Opinion OC-8/87, Series A No. 8, paras. 24 and 26.

⁹ See Inter-American Democratic Charter, adopted by the OAS General Assembly on 11 September 2001, Articles 3 and 4.

¹⁰ *Report of Special Rapporteurs on the situation of human rights in Nigeria*, UN document E/CN.4/1997/62/Add.1, para. 71.

¹¹ *Report of the Special Rapporteur on the independence of judges and lawyers*, UN document E/CN.4/1995/39, para. 55.

¹² *Ibid.*, paras. 32 and 34.

The Inter-American Court of Human Rights, in its judgment on the *Constitutional Court (Peru)* case, said that “one of the principal purposes of the separation of public powers is to guarantee the independence of judges”.¹³ The Court therefore considered that “under the rule of law, the independence of all judges must be guaranteed [...]”.¹⁴

The Human Rights Committee has also referred to the principle of separation of powers when it noted that “lack of clarity in the delimitation of the respective competences of the executive, legislative and judicial authorities may endanger the implementation of the rule of law and a consistent human rights policy”.¹⁵ The Committee has repeatedly recommended that States adopt legislation and measures to ensure that there is a clear distinction between the executive and judicial branches of government so that the former cannot interfere in matters for which the judiciary is responsible.¹⁶

- In the case of North Korea, the Committee expressed its concern “about constitutional and legislative provisions that seriously endanger the impartiality and independence of the judiciary, notably that the Central Court is accountable to the Supreme People's Assembly”.¹⁷

For its part, the European Court of Human Rights has reaffirmed that respect for the principle of the separation of powers is an essential principle of a functioning democracy which cannot be called into doubt.¹⁸

¹³ *Constitutional Court Case (Aguirre Roca, Rey Terry and Revoredo Marsano v. Peru)*, IACtHR judgment of 31 January 2001, Series C No. 55, para. 73.

¹⁴ *Ibid.*, para. 75.

¹⁵ Concluding Observations of the Human Rights Committee on Slovakia, CCPR/C/79/Add.79, para. 3.

¹⁶ Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add.111, para. 10. See also the Committee's Concluding Observations on Peru, CCPR/CO/70/PER, para. 10; the Concluding Observations on El Salvador, CCPR/C/79/Add.34, para. 15; the Concluding Observations on Tunisia, CCPR/C/79/Add.43, para. 14; and the Concluding Observations on Nepal, CCPR/C/79/Add.42, para. 18.

¹⁷ Concluding Observations of the Human Rights Committee on the Democratic People's Republic of Korea, CCPR/CO/72/PRK, para. 8. The Supreme People's Assembly is the North Korean legislature.

¹⁸ *Chevrol v. France*, ECtHR judgment of 13 February 2003, Series 2003-III, para. 74.

Under international law, the State is obliged to organise its apparatus in such a way that internationally protected rights and freedoms are guaranteed and their enjoyment is assured. In this connection, the Inter-American Court of Human Rights has said that “the protection of human rights must necessarily comprise the concept of the restriction of the exercise of state power”.¹⁹ The State apparatus must be organised in such a way that it is compatible with the State's international obligations, whether they be explicit or implicit. On this matter, the Inter-American Court of Human Rights has stated that “[t]he obligation to respect and guarantee such rights, which Article 1(1) [of the *American Convention on Human Rights*] imposes on the States Parties, implies [...] the duty of the States Parties to organize the governmental apparatus and, in general, all the structures through which public power is exercised, so that they are capable of juridically ensuring the free and full enjoyment of human rights”.²⁰

Intrinsic to compliance with the obligation to respect and guarantee human rights is the obligation to organise the State in such a way as to ensure that, among other things, the structure and operation of State power is founded on the true separation of its executive, legislative and judicial branches, the existence of an independent and impartial judiciary and implementation by the authorities in all their activities of the rule of law and the principle of legality.

The principle of the separation of powers is an essential requirement of the proper administration of justice. In fact, having a judiciary that is independent of the other branches of government is a necessary condition for the fair administration of justice as well as intrinsic to the rule of law.

¹⁹ The word "laws" in article 30 of the *American Convention on Human Rights*, Advisory Opinion of the IACtHR of 9 May 1986, OC-6/86, Series A No. 6, para. 21. See also *Velásquez Rodríguez Case*, IACtHR judgment of 29 July 1988, Series C No. 4, para. 165; and *Godínez Cruz Case*, IACtHR judgment of 20 January 1989, Series C No. 5, para. 174.

²⁰ *Exceptions to the Exhaustion of Domestic Remedies (Art. 46.1, 46.2.a and 46.2.b American Convention on Human Rights)*, Advisory Opinion of the IACtHR of 10 August 1990, OC-11/90, Series A No. 11, para. 23. See also *Velásquez Rodríguez Case*, *op. cit.*, para. 166; and, *Godínez Cruz Case*, *op. cit.*, para. 175.

Institutional independence

Independence and impartiality are closely linked, and in many instances tribunals have dealt with them jointly. However, each concept has its own distinct meaning. In general terms, “independence” refers to the autonomy of a given judge or tribunal to decide cases applying the law to the facts. This independence pertains to the judiciary as an institution (independence from other branches of power, referred to as “institutional independence) and to the particular judge (independence from other members of the judiciary, or “individual independence”). “Independence” requires that neither the judiciary nor the judges who compose it be subordinate to the other public powers. On the contrary, “impartiality” refers to the state of mind of a judge or tribunal towards a case and the parties to it. The Human Rights Committee has stated that in the context of article 14.1 of the ICCPR, “impartiality of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties”.²¹

The notion of institutional independence is set out in the second sentence of Principle 1 of the *UN Basic Principles*, wherein the duty of all institutions to respect and observe that independence is guaranteed. This notion means that the judiciary has to be independent of the other branches of government, namely the executive and parliament, which, like all other State institutions, have a duty to respect and abide by the judgments and decisions of the judiciary. This constitutes a safeguard against disagreements over rulings by other institutions and their potential refusal to comply with them. Such independence as to decision-making is essential for upholding the rule of law and human rights.

The European Court of Human Rights has stated that a court must be independent both of the executive branch of government as well as of the parties to the proceedings.²²

²¹ Communication 387/1989, *Arvo. O Karttunen v. Finland* (Views adopted on 23 October 1992), UN document CCPR/C/46/D/387/1989 (Jurisprudence), para. 7.2

²² *Ringeisen v. Austria*, ECtHR judgment of 16 July 1971, Series A13, para. 95.

The notion of institutional independence is related to several issues. On this matter, the Inter-American Commission of Human Rights has stated that:

- “the requirement of independence [...] necessitates that courts be autonomous from the other branches of government, free from influence, threats or interference from any source and for any reason, and benefit from other characteristics necessary for ensuring the correct and independent performance of judicial functions, including tenure and appropriate professional training”.²³

The Human Rights Committee has dealt with a number of requirements that pertain to institutional independence. For example, it has pointed out that delays in the payment of salaries and the lack of adequate security of tenure for judges have an adverse effect on the independence of the judiciary.²⁴ The Committee has also considered that the lack of any independent mechanism responsible for the recruitment and discipline of judges limits the independence of the judiciary.²⁵

International law contains a number of provisions related to certain essential aspects of the institutional independence of the judiciary. One of the means to control the outcome of particular cases is to assign them to specific judges who could potentially rule in favour of particular interests. In order to prevent this unwarranted interference, the *UN Basic Principles* provide that “The assignment of cases to judges within the court to which they belong is an internal matter of judicial administration”.²⁶

- In the case of Romania, the Human Rights Committee has considered that the powers exercised by the Ministry of Justice in regard to judicial matters, including the appeal process, and its powers of inspection of the courts constitute an interference by the executive and a threat to the independence of the judiciary.²⁷

²³ *Report on Terrorism and Human Rights, op. cit.*, para. 229.

²⁴ Concluding Observations of the Human Rights Committee on Georgia, UN document CCPR/CO/74/GEO, para. 12.

²⁵ Concluding Observations of the Human Rights Committee on the Congo, UN document CCPR/C/79/Add.118, para. 14

²⁶ *UN Basic Principles on the Independence of the Judiciary, op. cit.*, Principle 14.

²⁷ Concluding Observations of the Human Rights Committee on Romania, CCPR/C/79/Add.111, para. 10.

Furthermore, the independence of the judiciary requires it to have exclusive jurisdiction over all issues of judicial nature and to decide whether an issue before it is of judicial nature. As a corollary, judicial decisions cannot be changed by a non-judicial authority, except for cases of mitigation or commutation of sentences and pardons.²⁸

The European Court of Human Rights has extensively analysed the relationship between the judiciary and the legislature, concluding that the independence of the courts must be preserved and respected by the legislature.

- In a case in which a parliament adopted a law overturning the jurisdiction of the courts to hear certain requests for compensation against the Government and declaring the legally decreed damages to be null and void, the Court found that the independence of the courts had been violated. It stated that “[t]he principle of the rule of law and the notion of fair trial enshrined in Article 6 preclude any interference by the legislature with the administration of justice designed to influence the judicial determination of the dispute”.²⁹
- In *Papageorgiou v. Greece*, the European Court ruled that the adoption of a law by the parliament concerned in which it declared that certain cases could not be examined by the courts and ordering the ongoing legal proceedings to be suspended, constituted a violation of the independence of the judiciary.³⁰
- In *Findlay v. The United Kingdom*, the European Court recalled that it is a widely recognized principle that legal decisions should not be changed by authorities who are not part of the judiciary. In other words, it is not possible for the juridical validity of judicial decisions and their status as *res judicata* to be subject to action by other branches of government. The Court therefore found the independence of courts to have been violated if it is possible for their decisions to be changed by officials or bodies belonging to the executive and if such decisions

²⁸ UN Basic Principles on the Independence of the Judiciary, *op. cit.*, Principles 3 and 4. Principle 3 states: “The judiciary shall have jurisdiction over all issues of a judicial nature and shall have exclusive authority to decide whether an issue submitted for its decision is within its competence as defined by law.” Principle 4 says: “There shall not be any inappropriate or unwarranted interference with the judicial process, nor shall judicial decisions by the courts be subject to revision. This principle is without prejudice to judicial review or to mitigation or commutation by competent authorities of sentences imposed by the judiciary, in accordance with the law.”

²⁹ *Stran Greek Refineries and Stratis Andreadis v. Greece*, ECtHR judgment of 9 December 1994, Series A301-B, para. 49.

³⁰ *Papageorgiou v. Greece*, ECtHR judgment of 22 October 1997, Series 1997-VI.

can only be considered *res judicata* if they have been confirmed by such authorities.³¹ The irreversibility of judicial decisions, the fact that they cannot be changed or confirmed by authorities other than the judiciary, is, according to the Court, a well-established principle and “inherent in the very notion of 'tribunal' and [...] a component of [...] 'independence'”.³²

Individual independence

While it constitutes a vital safeguard, institutional independence is not sufficient for the right to a fair trial to be respected on every occasion. Unless individual judges are free from unwarranted interferences when they decide a particular case, the individual right to receive a fair trial is violated.

There are a number of factors, some of which will be dealt with below, in order to determine whether a tribunal is independent. As general criteria, the European Court of Human Rights has stated that “regard must be had, *inter alia*, to the manner of appointment of its members and their term of office, the existence of safeguards against outside pressures and the question of whether it presents an appearance of independence” when reviewing the independence of a tribunal.³³ The Court further stated that “the irremovability of judges by the executive must in general be considered as a corollary of their independence”.³⁴ It has also pointed out that a court or judge must not only fulfil these objective criteria but must also be seen to be independent.³⁵

Such independence does not mean that judges can decide cases according to their personal preferences. On the contrary, judges have a right and a duty to decide cases before them according to the law, free from fear of reprisals of any kind. As Principle 2 of the *UN Basic Principles* says: “The judiciary shall decide matters

³¹ *Findlay v. The United Kingdom*, *op. cit.*, para. 77. See also *Campbell and Fell v. The United Kingdom*, ECtHR judgment of 28 June 1984, Series A80, para. 79.

³² *Idem*.

³³ *Incal v. Turkey*, *op. cit.*, para. 65. See also, among others, *Findlay v. the United Kingdom*, *op. cit.*, para. 73 and *Bryan v. the United Kingdom*, ECtHR judgment of 22 November 1995, Series A no. 335-A, para. 37.

³⁴ *Campbell and Fell v. United Kingdom*, *op. cit.*, para. 80.

³⁵ See, *inter alia*: *Incal v. Turkey*, *op. cit.*, para. 65 and *Findlay v. United Kingdom*, *op. cit.*, para. 73.

before them impartially, on the basis of facts and in accordance with the law, without any restrictions, improper influences, inducements, pressures, threats or interferences, direct or indirect, from any quarter or for any reason". Regrettably, many judges around the world suffer from subtle and not-so-subtle pressure, ranging from killings and torture to extortion, transfer, proceedings for carrying out their professional duties, and unlawful removal from office.³⁶

Various UN bodies have repeatedly called on States to take all necessary measures to enable judges to discharge their functions freely.

- The UN Commission on Human Rights has called upon all Governments to "respect and uphold the independence of judges and lawyers and, to that end, to take effective legislative, law enforcement and other appropriate measures that will enable them to carry out their professional duties without harassment or intimidation of any kind".³⁷
- In the context of Colombia, the UN High Commissioner for Human Rights urged the State to "assume responsibility for protecting the life and integrity of prosecutors, judges, judicial police officials, victims and witnesses, without violating the fundamental rights of the accused".³⁸

From the perspective of their personal independence, it is crucial that judges are not subordinated hierarchically to the executive or legislative, nor that they are civil employees of these two powers. One of the fundamental requirements of judicial independence is that judges at all levels should be officers of the judiciary and not subordinate or accountable to other branches of government, especially the executive.

³⁶ See "Attacks on Justice: A Global Report on the Independence of Judges and Lawyers", 11th edition, International Commission of Jurists, Geneva 2002. Available online at <www.icj.org>

³⁷ Commission on Human Rights Resolution 2004/33, operative paragraph 7.

³⁸ *Report of the United Nations High Commissioner for Human Rights on the Office in Colombia*, UN document E/CN.4/2000/11, para. 189. See also the *Report by the United Nations High Commissioner for Human Rights to the Commission on Human Rights*, UN document E/CN.4/1998/16, para. 200, where the High Commissioner invited the Colombian Government to "take immediate steps to guarantee the full operation of the justice system, particularly through the effective protection of members of the judiciary [...]".

- In *Findlay v. United Kingdom*, the European Court of Human Rights considered that the court martial which tried the petitioner was neither independent nor impartial because its members were hierarchically subordinate to the officer discharging the function of both "convening officer" and prosecutor and who, in his capacity as "confirming officer", was also authorized to change the sentence that had been imposed.³⁹
- The United Nations Working Group on Arbitrary Detention found that the fact that the majority of the judges sitting on a Security Tribunal in the Republic of Djibouti were government officials was contrary to article 14 of the ICCPR which requires courts to be independent.⁴⁰
- The Inter-American Commission on Human Rights found that the fact that a court was made up of officials from the executive who, in the case in question, were serving military officers violated the right to be tried by an independent tribunal.⁴¹

Every State has the duty to put in place the necessary safeguards so that judges can decide cases in an independent manner. The independence of the judiciary must be upheld by refraining from interfering in its work and by complying with its rulings. The judiciary must be independent as an institution and individual judges must enjoy personal independence within the judiciary and in relation to other institutions.

³⁹ *Findlay v. The United Kingdom*, *op. cit.*, paras. 74 to 77. See also *Coyne v. The United Kingdom*, ECtHR judgment of 24 September 1997, Series 1997-V, paras. 56-58.

⁴⁰ Decision N° 40/1993 (Djibouti), 29 September 1993, UN document E/CN.4/1994/27.

⁴¹ Report N° 78/02, Case 11.335, *op. cit.*, para. 76.

2. IMPARTIALITY

Overview

The right to a fair trial requires judges to be impartial. The right to be tried by an impartial tribunal implies that judges (or jurors) have no interest or stake in a particular case and do not hold pre-formed opinions about it or the parties. Cases must only be decided “on the basis of facts and in accordance with the law, without any restriction”.¹ To this end, the State, other institutions and private parties have an obligation to refrain from putting pressure on or inducing judges to rule in a certain way and judges have a correlative duty to conduct themselves impartially. The *UN Basic Principles* spell out this requirement: “[...] judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary”.² The Council of Europe has reiterated this principle, by saying that “Judges should have unfettered freedom to decide cases impartially, in accordance with their conscience and their interpretation of the facts, and in pursuance of the prevailing rules of the law”.³

The Human Rights Committee has taken the view that the impartiality of the court and the publicity of proceedings are important aspects of the right to a fair trial within the meaning of article 14, paragraph 1.

- “‘Impartiality’ of the court implies that judges must not harbour preconceptions about the matter put before them, and that they must not act in ways that promote the interests of one of the parties. Where the grounds for disqualification of a judge are laid down by law, it is incumbent upon the court to consider *ex officio* these grounds and to replace members of the court falling under the disqualification criteria.”⁴

¹ *UN Basic Principles on the Independence of the Judiciary*, *op. cit.*, Principle 2.

² *Idem*, Principle 8.

³ Council of Europe, *Recommendation No. R (94)*, *op. cit.*, Principle I.2.d. See also Principle V.3.b: “Judges should in particular have the following responsibilities: to conduct cases in an impartial manner in accordance with their assessment of the facts and their understanding of the law, to ensure that a fair hearing is given to all parties and that the procedural rights of the parties are respected pursuant to the provisions of the Convention”.

⁴ Communication 387/1989, *Arvo O. Karttunen v. Finland*, *op. cit.*, para. 7.2.

- The Committee has also pointed out that the right to an impartial tribunal is closely bound up with the procedural guarantees conferred on the defence. Thus, in one case, the Committee said that “[a]n essential element of this right [to an impartial tribunal] is that an accused must have adequate time and facilities to prepare his defence”.⁵

For its part, the Inter-American Commission on Human Rights has said that “[a]n impartial tribunal is one of the core elements of the minimum guarantees in the administration of justice”.⁶

Actual and apparent impartiality

The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards either of the parties. However, there are cases in which this bias will not be manifest but only apparent. That is the reason why the impartiality of courts must be examined from a subjective as well as an objective perspective.

The European Court of Human Rights makes a distinction between “a subjective approach, that is endeavouring to ascertain the personal conviction of a given judge in a given case, and an objective approach, that is determining whether he offered guarantees sufficient to exclude any legitimate doubt in this respect”.⁷ The first of these concepts is called **subjective** impartiality; the second is referred to as **objective** impartiality. A trial will be unfair not only if the judge is not impartial but also if he or she is not perceived to be impartial.

The European Court of Human Rights has a long line of jurisprudence in which these two requirements of impartiality are defined. According to the Court, a judge or tribunal will only be

⁵ Communication No. 451/1991, *Barry Stephen Harward v. Norway* (Views adopted on 15 July 1994), UN document CCPR/C/51/D/451/1991, para. 9.4. See also Communication N° 577/1994, *Víctor Alfredo Polay Campos v. Peru* (Views adopted on 6 November 1997), UN document CCPR/C/61/D/577/1994, para. 8.8, where the Committee took the view that “a cardinal aspect of a fair trial within the meaning of article 14 of the Covenant [is] that the tribunal must be, and be seen to be, independent and impartial”.

⁶ Report N° 78/02, Case 11.335, *op. cit.*, para. 74.

⁷ For this distinction see, among others, *Piersack v. Belgium*, ECtHR of 1 October 1982, Series A53, para. 30.

impartial if it passes the subjective and objective tests. The subjective test “consists in seeking to determine the personal conviction of a particular judge in a given case”.⁸ This entails that “no member of the tribunal should hold any personal prejudice or bias. Personal impartiality is presumed unless there is evidence to the contrary”.⁹ The objective requirement of impartiality “consists in ascertaining whether the judge offered guarantees sufficient to exclude any legitimate doubt” as to his or her impartiality.¹⁰ Under the Court’s jurisprudence, if either test fails, a trial will be deemed unfair.

- In *De Cubber v. Belgium*, the Court considered that the successive exercise of the duties of investigating judge and trial judge by the same person can raise legitimate doubts about the impartiality of the court and constitute a violation of the right to be tried by an impartial tribunal.¹¹ Although the Court found no reason to doubt the impartiality of the member of the judiciary who had conducted the preliminary investigation, it acknowledged that his presence on the bench provided grounds for some legitimate misgivings on the applicant's part.
- In *Castillo Algar v. Spain*, the Court found that when a judge who has confirmed an indictment on the grounds that there is sufficient evidence against the accused goes on to sit on the tribunal that will be determining the merits of a case, legitimate doubts can be raised about the impartiality of that tribunal, thereby constituting a violation of the right to be tried by an impartial tribunal.¹²
- In its Report on Human Rights and Terrorism, the Commission said that “The impartiality of a tribunal must be evaluated from both a subjective and objective perspective, to ensure the absence of actual prejudice on the part of a judge or tribunal as well as sufficient assurances to exclude any legitimate doubt in this respect. These requirements in turn require that a judge or tribunal not harbor any actual bias in a particular case, and that the judge or tribunal not reasonably be perceived as being tainted with any bias.”¹³

⁸ *Tierce and Others v. San Marino*, ECtHR judgment of 25 July 2000, Series 2000-IX, para. 75

⁹ *Daktaras v. Lithuania*, ECtHR judgment of 10 October 2000, Series 2000-X, para. 30.

¹⁰ *Padovani v. Italy*, ECtHR judgment of 26 February 1993, Series A257-B, para. 25.

¹¹ *De Cubber v. Belgium*, ECtHR judgment of 26 October 1984, Series A86, paras 27 *et seq.*

¹² Case of *Castillo Algar v. Spain*, ECtHR judgment of 28 October 1998, Series 1998-VIII, paras 47 to 51.

¹³ Inter-American Commission on Human Rights, *Report on Terrorism and Human Rights*, *op. cit.*, para. 229.

The African Commission on Human and Peoples' Rights has also considered the issue of actual and apparent impartiality. In the *Constitutional Rights Project* case, the Commission decided that a tribunal composed of one judge and members of the armed forces could not be considered impartial because “regardless of the character of the individual members of such tribunals, its composition alone creates the appearance, if not actual lack, of impartiality”.¹⁴

The judicial duty to excuse oneself

The concept of impartiality creates a correlative duty for judges to step down from cases in which they think they will not be able to impart justice impartially or when their actual impartiality may be compromised. In these cases, they should not expect the parties to a case to challenge their impartiality but should excuse themselves and abstain from sitting in the case.

The *Bangalore Principles of Judicial Conduct*, which were adopted by the Judicial Group on Strengthening Judicial Integrity and noted by the UN Commission on Human Rights,¹⁵ include impartiality as one of the fundamental values inherent in the judicial function. Principle 2.5 provides detailed guidelines as to the cases in which judges should disqualify themselves from a case:

2.5 A judge shall disqualify himself or herself from participating in any proceedings in which the judge is unable to decide the matter impartially or in which it may appear to a reasonable observer that the judge is unable to decide the matter impartially. Such proceedings include, but are not limited to, instances where

2.5.1 the judge has actual bias or prejudice concerning a party or personal knowledge of disputed evidentiary facts concerning the proceedings;

¹⁴ *The Constitutional Rights Project v. Nigeria*, African Commission on Human and Peoples' Rights, Communication No. 87/93 (1995), paras. 13-14.

¹⁵ Commission on Human Rights, Resolution 2003/43.

2.5.2 *the judge previously served as a lawyer or was a material witness in the matter in controversy; or*

2.5.3 *the judge, or a member of the judge's family, has an economic interest in the outcome of the matter in controversy:*

*Provided that disqualification of a judge shall not be required if no other tribunal can be constituted to deal with the case or, because of urgent circumstances, failure to act could lead to a serious miscarriage of justice.*¹⁶

The *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* contain detailed criteria to determine the impartiality of a tribunal and specific cases in which impartiality would be undermined. Among the latter, the African Commission has included cases such as that of a former public prosecutor or legal representative sitting as a judicial officer in a case in which he or she prosecuted or represented a party and a judicial official sitting as member of an appeal tribunal in a case which he or she decided or participated in a lower judicial body. If any of the circumstances described in the *Guidelines* is present, the judicial official is under an obligation to step down from the case.¹⁷

The impartiality of a court can be defined as the absence of bias, animosity or sympathy towards either of the parties. Courts must be impartial and appear impartial. Thus, judges have a duty to step down from cases in which there are sufficient motives to put their impartiality into question.

¹⁶ The *Bangalore Principles of Judicial Conduct*, adopted by the Judicial Group on Strengthening Judicial Integrity, as revised at the Round Table Meeting of Chief Justices at The Hague, 2002.

¹⁷ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, adopted as part of the African Commission's activity report at 2nd Summit and Meeting of Heads of State of African Union, Maputo, 4 -12 July 2003, Principle A, para. 5.

3. FINANCIAL AUTONOMY AND SUFFICIENT RESOURCES

Overview

The judiciary needs adequate resources to discharge its functions appropriately. As one of the three branches of power, the judiciary receives its resources from the national budget, which, in turn, is usually determined by either the legislature or the executive. It is essential that those outlining and approving the State budget take the needs of the judiciary into consideration. Inadequate resources may render the judiciary vulnerable to corruption, which could result in a weakening of its independence and impartiality. In determining the resources allocated to the judiciary, consultations must be held with judges or groups of judges.¹

Another factor that undermines judicial independence and impartiality is the lack of participation of the judiciary in the elaboration of its budget. This is due to the fact that one of the most common and effective ways of controlling any institution is by restricting its finances. Inasmuch as other branches of power or State institutions wield an important influence in the allocation and administration of those resources given to the judiciary, there is a real possibility of influencing the outcomes of particularly sensitive cases, which would entail an attack on the independence of the judiciary. To this end, many States have created, within the judiciary, bodies in charge of administering judicial resources, thus reinforcing the autonomy of the judicial organ.

- The Inter-American Commission on Human Rights had considered that the institutional autonomy of the judiciary - including management, administration and financial matters - “are essential and indispensable for maintaining the necessary balance of power in a democratic society”.²

¹ See the *Policy Framework for Preventing and Eliminating Corruption and Ensuring the Impartiality of the Judicial System*, ICJ’s Centre for the Independence of Judges and Lawyers (CIJL), CIJL Yearbook 2000, p. 127 *et seq.*

² Inter-American Commission on Human Rights, *Second Report on the Situation of Human Rights in Peru*, OAS document OEA/Ser.L/V/II.106 Doc. 59 rev., Chapter II “Administration of justice and Rule of law”, para. 13.

International standards on financial autonomy

Various international instruments recognise the need for the judiciary to receive sufficient funds. For example, the *UN Basic Principles* establish that “It is the duty of each Member State to provide adequate resources to enable the judiciary to properly perform its functions”.³ The *European Charter on the statute for judges* stipulates that “the State has the duty of ensuring that judges have the means necessary to accomplish their tasks properly, and in particular to deal with cases within a reasonable period”.⁴ The *Beijing Principles* also acknowledge this requirement by stating that “It is essential that judges be provided with the resources necessary to enable them to perform their functions”.⁵

The *Latimer House Guidelines*, which were approved by judges from Commonwealth countries, contain a detailed provision on funding:

*“Sufficient and sustainable funding should be provided to enable the judiciary to perform its functions to the highest standards. Such funds, once voted for the judiciary by the legislature, should be protected from alienation or misuse. The allocation or withholding of funding should not be used as a means of exercising improper control over the judiciary.”*⁶

In the African context, the *Guidelines on a Right to a Fair Trial in Africa* establish that “States shall endow judicial bodies with adequate resources for the performance of their functions. The judiciary shall be consulted regarding the preparation of budget and its implementation.”⁷

It is worth noting that international standards allow every State to determine the best way to guarantee that the judiciary receives

³ *UN Basic Principles on the Independence of the Judiciary*, *op. cit.*, Principle 7.

⁴ Council of Europe, *European Charter on the statute for judges*, DAJ/DOC (98) 23, operative paragraph 1.6.

⁵ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *op. cit.*, operative paragraph 41. See also *Recommendation No. R (94) 12 of the Committee of Ministers of the Council of Europe*, *op. cit.*, Principle III.

⁶ *Latimer House Guidelines for the Commonwealth on Parliamentary Supremacy and Judicial Independence*, adopted on 19 June 1998, Guideline II.2.

⁷ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *op. cit.*, paragraph A, 4 (v). See also the *Universal Charter of the Judge*, *op. cit.*, article 14.

adequate funds. As adequate funding is an essential component of the independence of the judiciary,⁸ this principle should be included in each country's legal system, preferably in the constitution. In order to comply with this requirement, certain constitutions include a provision by which they stipulate that a fixed percentage of the budget shall be allocated to the administration of justice.

Certain countries, particularly those in the developing world, might be incapable of providing the judiciary with the resources that the latter deems necessary for the proper discharge of its functions. On this matter, the *Beijing Principles* stipulate that:

*“where economic constraints make it difficult to allocate to the court system facilities and resources which judges consider adequate to enable them to perform their functions, the essential maintenance of the Rule of Law and the protection of human rights nevertheless require that the needs of the judiciary and the court system be accorded a high level of priority in the allocation of resources”.*⁹

A further requirement regarding financial autonomy dictates that the judiciary should be autonomous to decide how to allocate its resources. In this regard, all other institutions must refrain from interfering with the way the judiciary disposes of the resources allocated to it. Even though the way resources are spent is the judiciary's own internal matter, that branch of power is accountable to the others by virtue of the system of checks and balances.

⁸ See *UN Basic Principles on the Independence of the Judiciary*, *op. cit.*, which require States to guarantee the independence of the judiciary and to enshrine it in the Constitution or the law of the country (Principle 1).

⁹ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *op. cit.*, operative paragraph 42.

The judiciary should be adequately funded in order to discharge its functions. States have a duty to guarantee this requirement, preferably by means of legislation. Judicial participation in the delineation of the budget constitutes an important safeguard against insufficient funding. Even though the judiciary enjoys financial autonomy as to the way it allocates resources, it must remain accountable for any misuse to the other branches of power.

4. FUNDAMENTAL FREEDOMS

Overview

Principle 8 of the *UN Basic Principles* provides that:

*In accordance with the Universal Declaration of Human Rights, members of the judiciary are like other citizens entitled to freedom of expression, belief, association and assembly; provided, however, that in exercising such rights, judges shall always conduct themselves in such a manner as to preserve the dignity of their office and the impartiality and independence of the judiciary.*¹

This provision reaffirms the importance of these freedoms as a means for judges to protect their independence. As the principle states, these freedoms are also enjoyed by all other citizens and are recognised by all major international human rights treaties. However, as judges are essential guarantors of human rights and the rule of law, these freedoms have an added importance. In particular, freedom of association and expression are fundamental to the fulfilment of their roles.

Freedom of association

Associations of judges play an essential role in ensuring that the independence of the judiciary and the rule of law are respected. These associations bring judges together and allow them to organise themselves in order to defend their independence and that of the judicial profession more effectively.

In this regard, the *Latimer House Guidelines* state: “An independent, organised legal profession is an essential component in the protection of the rule of law”.² The *European Charter on the statute*

¹ In similar terms, see Principle 4.6 of the Bangalore Principles and Principle A, paragraph 4 (s) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa.

² *Latimer House Guidelines, op. cit.*, Guideline VII.3. See also article 12 of the *Universal Charter of the Judge*: “The right of a judge to belong to a professional association must be recognized in order to permit the judges to be consulted, especially concerning the application of their statutes, ethical and otherwise, and the means of justice, and in order to permit them to defend their legitimate interests”.

for judges recognises the fundamental role played by associations of judges when it stipulates that

*“Professional organizations set up by judges, and to which all judges may freely adhere, contribute notably to the defence of those rights which are conferred on them by their statute, in particular in relation to authorities and bodies which are involved in decisions regarding them.”*³

The Council of Europe has also acknowledged judges' freedom of association in its *Recommendation No. R (94) 12*: “Judges should be free to form associations which, either alone or with another body, have the task of safeguarding their independence and protect their interests”.⁴ The *Beijing Principles* also recognise this freedom when they stipulate that “Judges shall be free subject to any applicable law to form and join an association of judges to represent their interests and promote their professional training and to take such other action to protect their independence as may be appropriate”.⁵

Freedom of expression

Freedom of expression is also vital to a judge's role. As guarantors of the rule of law and an integral part of the legal community, judges must necessarily participate in the debate for reforms and other legal issues.

Beyond the general recognition it receives in all major international human rights treaties, the right to freedom of expression is included in a number of specific instruments related to the independence of the judiciary, most notably Principle 8 of the *UN Basic Principles*.

³ *European Charter on the statute for judges, op. cit.*, operative paragraph 1.7. See also Principle 9 of the *UN Basic Principles*: “Judges shall be free to form and join associations of judges or other organizations to represent their interests, to promote their professional training and to protect their judicial independence”.

⁴ *Recommendation No. R (94) 12, op. cit.*, Principle IV.

⁵ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, op. cit.* operative paragraph 9. See also the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, Principle A, paragraph 4 (t): “Judicial officers shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status”.

However, this right is not unlimited but subject to certain limitations inherent in the judicial function. In the case of judges, an unfettered exercise of the right to freedom of expression may compromise their independence or impartiality, for example if they disclose relevant information on a particular case to one of the parties or to the media. Thus, judges must refrain from undermining the right to a fair trial, including the presumption of innocence, particularly in the cases *sub judice*.

In this sense, the *European Charter on the statute for judges* stipulates that “Judges must refrain from any behaviour, action or expression of a kind effectively to affect confidence in their impartiality and their independence”.⁶

The *Bangalore Principles* also call on judges to refrain from compromising the requisites their position require when they state that:

*“A judge, like any other citizen, is entitled to freedom of expression, [...], but in exercising such rights, a judge shall always conduct himself or herself in such a manner as to preserve the dignity of the judicial office and the impartiality and independence of the judiciary”.*⁷

Therefore, while judges can freely express their opinions on any matters, they must abstain from making pronouncements that would, in the eyes of an objective observer, compromise their ability to impart justice independently and impartially.

Judges enjoy the same fundamental freedoms as other individuals. Due to their fundamental role in the administration of justice, freedom of expression and association are particularly important. In exercising these freedoms, judges must be careful not to compromise their independence and impartiality.

⁶ *European Charter on the statute for judges, op. cit.*, operative paragraph 4.3.

⁷ *Bangalore Principles*, Principle 4.6. See also Principle 4.10: “Confidential information acquired by a judge in the judge's judicial capacity shall not be used or disclosed by the judge for any other purpose not related to the judge's judicial duties”.

5. APPOINTMENT

Overview

In order to guarantee the independence and impartiality of the judiciary, international law requires States to appoint judges through strict selection criteria and in a transparent manner. Unless judges are appointed and promoted on the basis of their legal skills, the judiciary runs the risk of not complying with its core function: imparting justice independently and impartially. Therefore, clear selection criteria based on merit are an essential guarantee of independence. There is, however, no agreement in international law as to the method of appointment. In this field, a certain degree of discretion is left to individual States, provided that the selection be always based on the candidates' professional qualifications and personal integrity.

Thus, there are two crucial issues related to the appointment of judges. The first is related to the criteria applied to the appointment, where international law stipulates clear guidelines. The second issue consists of the body, and the procedure within that body, in charge of appointing members of the judiciary. On this topic, international standards do not explicitly determine which body within a State has the power to appoint judges or the exact procedure to be followed. However, it is important to bear in mind that any appointment procedure must guarantee judicial independence, both institutional and individual, and impartiality, both objective and subjective. This requirement derives from the principle of separation of powers and of checks and balances, which constitute indispensable safeguards to this end.

Appointment criteria

In order to avoid appointments that would seriously undermine the independence and impartiality of the judiciary, international law specifically excludes selection criteria such as a person's political views, race or colour. These motives are irrelevant to the judicial function, the exception being the requirement for a person to be a national of the State concerned.

The *UN Basic Principles* establish that:

“Persons selected for judicial office shall be individuals of integrity and ability with appropriate training or qualifications in law. Any method of judicial selection shall safeguard against judicial appointments for improper motives. In the selection of judges, there shall be no discrimination against a person on the grounds of race, colour, sex, religion, political or other opinion, national or social origin, property, birth or status, except that a requirement, that a candidate for judicial office must be a national of the country concerned, shall not be considered discriminatory.”¹

Similarly, the *Universal Charter of the Judge* stipulates that: “The selection and each appointment of a judge must be carried out according to objective and transparent criteria based on proper professional qualification”.²

The *European Charter on the statute for judges* also excludes improper criteria: “The rules of the statute [...] base the choice of candidates on their ability to assess freely and impartially the legal matters which will be referred to them, and to apply the law to them with respect for individual dignity. The statute excludes any candidate being ruled out by reason only of their sex, or ethnic or social origin, or by reason of their philosophical and political opinions or religious convictions.”³

The Council of Europe has recommended that “All decisions concerning the professional career of judges should be based on objective criteria, and the selection and career of judges should be based on merit, having regard to qualifications, integrity, ability and efficiency.”⁴ As the appointment of a judge is part of his or her career, this recommendation refers to both a judge’s initial entry into the judicial career as well as to any subsequent promotion.

¹ *UN Basic Principles on the Independence of the Judiciary*, *op. cit.*, Principle 10

² *Universal Charter of the Judge*, *op. cit.* article 9.

³ *European Charter on the statute for judges*, *op. cit.*, operative paragraph 2.1. The Charter further envisages that “The statute makes provision for the conditions which guarantee, by requirements linked to educational qualifications or previous experience, the ability specifically to discharge judicial duties.” (operative paragraph 2.2).

⁴ Council of Europe, *Recommendation No. R (94) 12*, *op. cit.*, Principle I.2.c

The *African Principles and Guidelines on the Right to a Fair Trial* establish that

“The sole criteria for appointment to judicial office shall be the suitability of a candidate for such office by reason of integrity, appropriate training or learning and ability”.

Furthermore, the *Guidelines* refer to the essential skills a candidate must possess:

*“No person shall be appointed to judicial office unless they have the appropriate training or learning that enables them to adequately fulfil their functions”.*⁵

In the Asia-Pacific region, the *Beijing Principles* also contain a provision against discrimination with a similar caveat on nationality: “In the selection [of] judges there must be no discrimination against a person on the basis of race, colour, gender, religion, political or other opinion, national or social origin, marital status, sexual orientation, property, birth or status, except that a requirement that a candidate for judicial office must be a national of the country concerned shall not be considered discriminatory.”⁶

The *Latimer House Guidelines* a similar provision to the one found in other instruments, with the particularity that it includes an obligation to work towards the removal of disparities within the judiciary:

⁵ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, *op. cit.*, Principle A, paragraphs 4 (i) and (k). The *Guidelines* also contain a non-discrimination clause, with, however, certain exceptions: “Any person who meets the criteria shall be entitled to be considered for judicial office without discrimination on any grounds such as race, colour, ethnic origin, language, sex, gender, political or other opinion, religion, creed, disability, national or social origin, birth, economic or other status. However, it shall not be discriminatory for states to: 1. prescribe a minimum age or experience for candidates for judicial office; 2. prescribe a maximum or retirement age or duration of service for judicial officers; 3. prescribe that such maximum or retirement age or duration of service may vary with different level of judges, magistrates or other officers in the judiciary; 4. require that only nationals of the state concerned shall be eligible for appointment to judicial office.” (Principle 4.j).

⁶ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region*, *op. cit.*, operative paragraph 13.

*“Judicial appointments to all levels of the judiciary should be made on merit with appropriate provision for the progressive removal of gender imbalance and of other historic factors of discrimination”.*⁷

The Human Rights Committee has repeatedly referred to the criteria under which judges are appointed and has established that judges should be appointed for their professional skills.

- After examining the State report from Bolivia, the Committee recommended “that the nomination of judges should be based on their competence and not their political affiliation”.⁸
- In the case of Azerbaijan, the Committee recommended that country to “[institute] clear and transparent procedures to be applied in judicial appointments and assignments, in order to [...] safeguard the independence and impartiality of the judiciary”.⁹
- Regarding Sudan, the Committee expressed its concern that “in appearance as well as in fact the judiciary is not truly independent, that many judges have not been selected primarily on the basis of their legal qualifications [...] and that very few non-Muslims or women occupy judicial positions at all levels”. It therefore recommended that “measures should be taken to improve the independence and technical competence of the judiciary, including the appointment of qualified judges from among women and members of minorities”.¹⁰
- In the case of Slovakia, the Committee “noted with concern” that the rules in force “governing the appointment of judges by the Government with approval of Parliament could have a negative effect on the independence of the judiciary” and recommended the adoption of “specific measures guaranteeing the independence of the judiciary, protecting judges from any form of political influence through the adoption of laws regulating the appointment, remuneration, tenure, dismissal and disciplining of members of the judiciary”.¹¹

⁷ *Latimer House Guidelines, op. cit*, Principle II.1.

⁸ Concluding Observations of the Human Rights Committee on Bolivia, UN document CCPR/C/79/Add.74, para. 34. See also the Concluding Observations on Lebanon, UN document CCPR/C/79/Add.78, para. 15.

⁹ Concluding Observations of the Human Rights Committee on Azerbaijan, UN document CCPR/CO/73/AZE, para. 14.

¹⁰ Concluding Observations of the Human Rights Committee on Sudan, UN document CCPR/C/79/Add.85, para. 21.

¹¹ Concluding Observations of the Human Rights Committee on Slovakia, UN document CCPR/C/79/Add.79, para. 18.

- In the case of the Republic of Moldova, the Committee expressed its concern at “short initial appointments for judges, beyond which they must satisfy certain criteria in order to gain an extension of their term”, and recommended the Government to “revise its law to ensure that judges' tenure is sufficiently long to ensure their independence, in compliance with the requirements of article 14, paragraph 1 [on the right to a fair trial by an independent and impartial tribunal]”.¹²

Appointment procedure

As stated in the introduction to this chapter, international law does not lay down one single appointment procedure. However, a number of international instruments contain certain requirements to be taken into account in this matter, particularly on the role of the other branches of power and the characteristics of the body in charge of appointments.

In general terms, it is preferable for judges to be elected by their peers or by a body independent from the executive and the legislature. This is, for example, what the *European Charter on the statute for judges* envisages when it stipulates that: “In respect of every decision affecting the selection, recruitment, appointment, career progress or termination of office of a judge, the statute envisages the intervention of an authority independent of the executive and legislative powers within which at least one half of those who sit are judges elected by their peers following methods guaranteeing the widest representation of the judiciary”.¹³

For its part, the Council of Europe has laid down detailed guidelines on appointment procedures and the body in charge of selecting judges:

“The authority taking the decision on the selection and career of judges should be independent of the government and the administration. In order to safeguard its independence, rules should ensure that, for

¹² Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN document CCPR/CO/75/MDA, para. 12.

¹³ *European Charter on the statute for judges, op. cit.*, operative paragraph 1.3

*instance, its members are selected by the judiciary and that the authority decides itself on its procedural rules”.*¹⁴

The Council, however, acknowledges that in certain States it is common for the Government to appoint judges and that this practice can be compatible with the independence of the judiciary as long as certain safeguards are put into place. In this sense, the Council has stipulated that “[...] where the constitutional or legal provisions and traditions allow judges to be appointed by the government, *there should be guarantees to ensure that the procedures to appoint judges are transparent and independent in practice and that the decisions will not be influenced by any reasons other than those related to the objective criteria mentioned above*”.¹⁵

For their part, the *African Guidelines* support the idea of an independent body entrusted with selecting judicial officers, but allow for other bodies, including the other branches of power, to perform this function as long as they comply with certain criteria:

*“The process for appointments to judicial bodies shall be transparent and accountable and the establishment of an independent body for this purpose is encouraged. Any method of judicial selection shall safeguard the independence and impartiality of the judiciary.”*¹⁶

There have been numerous occasions where the Human Rights Committee has referred to the manner in which judges are appointed and recommended more transparent proceedings.

- In the case of the Congo, the Committee expressed its concern at “the attacks on the independence of the judiciary, in violation of article 14,

¹⁴ *Recommendation No. R (94) 12, op. cit.*, Principle I.2.c. See also article 9 of the *Universal Charter of the Judge*: “[...] Where this is not ensured in other ways, that are rooted in established and proven tradition, selection should be carried out by an independent body, that include substantial judicial representation”.

¹⁵ *Idem*, emphasis added. In order to ensure this transparency, a number of examples are provided for in the recommendation: “a special independent and competent body to give the government advice which it follows in practice; or the right for an individual to appeal against a decision to an independent authority; or the authority which makes the decision safeguards against undue or improper influences”. This is not an exhaustive list and that the examples are not mutually exclusive.

¹⁶ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, op. cit.*, Principle A, paragraph 4 (h). See also the *Beijing Principles*, Principles 13 to 17 and the *Latimer House Guidelines, op. cit.*, principle II.1.

paragraph 1, of the Covenant” and drew attention to the fact that such independence was “limited owing to the lack of any independent mechanism responsible for the recruitment and discipline of judges, and to the many pressures and influences, including those of the executive branch, to which judges are subjected”. The Committee recommended the Congolese Government to “take the appropriate steps to ensure the independence of the judiciary, in particular by amending the rules concerning the composition and operation of the Supreme Council of Justice and its effective establishment”.¹⁷

- In the case of Liechtenstein, the Committee considered that the intervention of the executive in the selection of judges, by means of casting votes, undermined the independence of the judiciary.¹⁸

The European Court of Human Rights has also dealt with cases in which the independence and impartiality of a tribunal was challenged due to the manner in which its judges had been appointed.

- In *Incal v. Turkey*, the Court had to determine the impartiality of the tribunal that had convicted Mr. Incal. The defendant argued that the presence of a military judge violated his right to be tried by an independent tribunal because the said judge was subordinated to the executive. The Court ruled that “In this respect even appearances may be of a certain importance. What is at stake is the confidence which the courts in a democratic society must inspire in the public and above all, as far as criminal proceedings are concerned, in the accused. [...] In deciding whether there is a legitimate reason to fear that a particular court lacks independence or impartiality, the standpoint of the accused is important without being decisive. What is decisive is whether his doubts can be held to be objectively justified.” The Court concluded that Mr. Incal “could legitimately fear that because one of the judges of the Izmir National Security Court was a military judge it might allow itself to be unduly influenced by considerations which had nothing to do with the nature of the case” and, therefore, that he “had legitimate cause to doubt the independence and impartiality of the [...] Court”.¹⁹

¹⁷ Concluding Observations of the Human Rights Committee on the Congo, UN document CCPR/C/79/Add.118, para. 14. The Committee further said that “particular attention should be given to the training of judges and to the system governing their recruitment and discipline, in order to free them from political, financial and other pressures, ensure their security of tenure and enable them to render justice promptly and impartially. It invites the State party to adopt effective measures to that end and to take the appropriate steps to ensure that more judges are given adequate training.

¹⁸ Concluding Observations of the Human Rights Committee on Liechtenstein, UN document CCPR/CO/81/LIE, para. 12.

¹⁹ *Incal v. Turkey*, *op. cit.*, paras. 71-73. See also *Sahiner v. Turkey*, ECtHR judgment of 25 September 2001, Series 2001-IX, paras. 45-46, where the Court said that “where, as

- In *Lauko v. Slovakia*, the Court had to determine whether Mr. Lauko's right to a fair trial had been violated after a local office fined him and a district office confirmed the fine. The Court noted that the local office and the district office were charged with "carrying out local state administration under the control of the government" and that "the appointment of the heads of those bodies is controlled by the executive and their officers, whose employment contracts are governed by the provisions of the Labour Code, have the status of salaried employees". The Court concluded that "the manner of appointment of the officers of the local and district offices together with the lack of any guarantees against outside pressures and any appearance of independence clearly show that those bodies cannot be considered to be 'independent' of the executive within the meaning of Article 6 § 1 of the Convention [on the right to a fair trial]". According to the Court, "entrusting the prosecution and punishment of minor offences to administrative authorities is not inconsistent with the Convention, it is to be stressed that the person concerned must have an opportunity to challenge any decision made against him before a tribunal that offers the guarantees of Article 6". The Court found that Mr. Lauko's right to a fair trial had been violated because he was "unable to have the decisions [...] reviewed by an independent and impartial tribunal since his complaint was dismissed by the Constitutional Court on the ground that the minor offence in issue could not be examined by a court".²⁰

Regarding the appointment of judges, the Inter-American Court of Human Rights has considered that "one of the principal purposes of the separation of public powers is to guarantee the independence of judges and, to this end, the different political systems have conceived strict procedures for both their appointment and removal" and that "the independence of any judge presumes that there is an appropriate appointment process, a fixed term in the position and a guarantee against external pressures".²¹

in the present case, a tribunal's members include persons who are in a subordinate position, in terms of their duties and the organisation of their service, vis-à-vis one of the parties, accused persons may entertain a legitimate doubt about those persons' independence. Such a situation seriously affects the confidence which the courts must inspire in a democratic society." The Court concluded that Mr. Sahiner, who had been tried in a martial-law court on charges of attempting to undermine the constitutional order of the State "could have legitimate reason to fear being tried by a bench which included two military judges and an army officer acting under the authority of the martial-law commander. The fact that two civilian judges, whose independence and impartiality are not in doubt, sat in that court makes no difference in this respect".

²⁰ *Lauko v. Slovakia*, ECtHR judgment of 2 September 1998, Series 1998-IV, para. 64.

²¹ *Constitutional Court Case*, *op. cit.*, paras. 73 and 75 respectively.

Election by popular vote

In certain countries it is common for judges to be elected by popular vote. While this may seem more democratic, and thus more transparent than appointment by a designated body, popular election raises many issues as to the suitability of the candidates elected. When dealing with this practice in some states in the United States of America, the Human Rights Committee expressed its concern “about the impact which the current system of election of judges may, in a few states, have on the implementation of the rights provided under article 14 of the Covenant [on the right to be tried by an independent and impartial tribunal]” and welcomed “the efforts of a number of states in the adoption of a merit-selection system”. Furthermore, the Committee recommended that the system of “appointment of judges through elections be reconsidered with a view to its replacement by a system of appointment on merit by an independent body”.²²

Judges should be appointed on their professional qualifications and through a transparent procedure. Even though international standards do not forbid that appointments be carried out by the executive or the legislature, it is preferable that the selection be entrusted to an independent body so that political considerations do not play any role in the proceedings. Irrespective of the body in charge of appointing judges, the outcome of such selection must always guarantee that the candidates appointed to the judiciary possess the necessary skills and independence.

²² Concluding Observations of the Human Rights Committee on the United States of America, UN document CCPR/C/79/Add.50; A/50/40, paras. 266-304, paras. 288 and 301. See also the Committee’s Concluding Observations on Armenia, where it said that “the independence of the judiciary is not fully guaranteed. In particular, it observes that the election of judges by popular vote for a fixed maximum term of six years does not ensure their independence and impartiality”, UN document CCPR/C/79/Add.100, para. 8.

6. CONDITIONS OF TENURE AND PROMOTION

Overview

One of the basic conditions for judges to retain their independence is that of security of tenure. Unless judges have long-term security of tenure, they are susceptible to undue pressure from different quarters, mainly those in charge of renewing their posts. This problem is particularly acute in countries where the executive plays a predominant role in the selection and appointment of judges. In such countries, judges may be subjected to, and succumb to, political pressure in order to have their posts renewed, thereby compromising their independence.

Another way of guaranteeing the independence of the judiciary is by establishing a clear system of promotion for judges. In this sense, systems based on competence or seniority of the judges are acceptable. Irrespective of the system chosen, States must ensure that judges advance in their careers according to objective criteria determined by an independent body.

International standards on tenure

The international standards on the independence of the judiciary establish a number of requirements related to the conditions of service and tenure of judges. For example, the *UN Basic Principles* stipulate that States have the duty to guarantee the conditions of service and tenure in their legislation: "The term of office of judges, their independence, security, adequate remuneration, conditions of service, pensions and the age of retirement shall be adequately secured by law".¹ When referring specifically to tenure, the *Principles* stipulate that "Judges, whether appointed or elected, shall have guaranteed tenure until a mandatory retirement age or the expiry of their term of office, where such exists".² While this provision does not unambiguously state that it is preferable for judges to be appointed for life (always subject to their ability to

¹ *UN Basic Principles on the Independence of the Judiciary*, Principle 11. Principle I.3 of the Council of Europe's *Recommendation No. R (94 12)* is identical.

² *Idem*, Principle 12.

properly discharge their functions), tenure for life provides a safeguard for judicial independence.

Tenure for life is provided for in the *Latimer House Guidelines*, which clearly state that permanent appointments should be the norm. The *Guidelines* also recognise that certain countries will appoint judges for temporary posts. These appointments, however, must comply with the general conditions of tenure in order to safeguard their independence.³ This is also the case with the *Universal Charter of the Judge*, which provides that “A judge must be appointed for life or for such other period and conditions, that the judicial independence is not endangered”.⁴

In the African system, the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa* provide that: “Judges or members of judicial bodies shall have security of tenure until a mandatory retirement age or the expiry of their term of office” and that “the tenure, adequate remuneration, pension, housing, transport, conditions of physical and social security, age of retirement, disciplinary and recourse mechanisms and other conditions of service of judicial officers shall be prescribed and guaranteed by law”.⁵ The *African Guidelines* are also quite clear on appointments limited in time when they state that “judicial officers shall not be appointed under a contract for a fixed term”.⁶

The *Beijing Principles* also establish that “Judges must have security of tenure”. However, the *Principles* acknowledge that in different systems “the tenure of judges is subject to confirmation from time to time by vote of the people or other formal procedure”. In such cases, it is recommended “that all judges

³ *Latimer House Guidelines, op. cit.*, Guideline II.1: “Judicial appointments should normally be permanent; whilst in some jurisdictions, contract appointments may be inevitable, such appointments should be subject to appropriate security of tenure”.

⁴ *Universal Charter of the Judge, op. cit.*, article 8. The same article also contains a provision on retirement: “Any change to the judicial obligatory retirement age must not have retroactive effect”.

⁵ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, op. cit.*, Principle A, paragraphs 4 (l) and (m).

⁶ *Idem*, Principle A, paragraph 4 (n) 3.

exercising the same Jurisdiction be appointed for a period to expire upon the attainment of a particular age".⁷

Practices that affect tenure

One of the most common practices that affects judges' tenure is that of appointing "provisional judges", i.e. judges who not enjoy security of tenure in their positions and can be freely removed or suspended. According to the Inter-American Commission on Human Rights, the provisional character of these judges "implies that their actions are subject to conditions, and that they cannot feel legally protected from undue interference or pressure from other parts of judiciary or from external sources".⁸ On this matter, the Commission has stated that "having a high percentage of provisional judges has a serious detrimental impact on citizens' right to proper justice and on the judges' right to stability in their positions as a guarantee of judicial independence and autonomy".⁹

Another way to impinge on judges' tenure is to make them undergo a rectification procedure at certain intervals in order to determine whether they can continue in office.

- The Human Rights Committee has referred to the practice of rectification procedures when it analysed the case of Peru. On that occasion, the Committee noted with concern that "judges retire at the end of seven years and require recertification for reappointment, a practice which tends to affect the independence of the judiciary by denying security of tenure". The Committee recommended that "the requirement for judges to be recertified be reviewed and replaced by a system of secure tenure and independent judicial supervision".¹⁰

⁷ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, op. cit.*, operative paragraphs 18-20. See also operative paragraph 21, which states that "A judge's tenure must not be altered to the disadvantage of the judge during her or his term of office".

⁸ *Report on the Situation of Human Rights in Venezuela*, OAS document OEA/Ser.L/V/II.118 doc. 4 rev. 2, 29 December 2003, para. 159.

⁹ *Idem*, para. 160 and the Commission's conclusion that "the provisional tenure of most of the judges in Venezuela affects their stability in office, which is a necessary condition for the independence of the judiciary", at para. 540. See also the *Second Report on the Situation of Human Rights in Peru*, OAS document OEA/Ser.L/V/II.106, Doc. 59 rev., 2 June 2000, paras. 14-15.

¹⁰ Concluding Observations of the Human Rights Committee on Peru, Report of the Human Rights Committee, Volume I, GAOR A/51/40, paras. 352 and 364.

- In the case of Lithuania, the Committee noted that “District Court judges must still undergo a review by the executive after five years of service in order to secure permanent appointment” and it recommended that “any such review process should be concerned only with judicial competence and should be carried out only by an independent professional body”.¹¹
- In the case of Viet Nam, the Committee expressed its concern about the “procedures for the selection of judges as well as their lack of security of tenure” because judges were appointed for only four years. These factors, combined with the possibility of taking far-reaching disciplinary measures against judges, exposed them to political pressure and jeopardised their independence and impartiality.¹²
- After evaluating the report submitted by Kyrgyzstan, the Committee noted that “the applicable attestation procedure for judges, the requirement of re-evaluation every seven years, the low level of salaries and the uncertain tenure of judges may encourage corruption and bribery”.¹³

Promotion

Another aspect of tenure refers to the factors that determine promotions. In this case, the criteria are similar to those that regulate appointment, i.e. objective. For example, the *UN Basic Principles* establish that

*“Promotion of judges, wherever such a system exists, should be based on objective factors, in particular ability, integrity and experience”.*¹⁴

The *Beijing Principles* contain similar wording, but add independence as a factor: “Promotion of judges must be based on

¹¹Concluding Observations of the Human Rights Committee on Lithuania, UN document CCPR/C/79/Add.87, para. 16. See also the Committee’s Concluding Observations on Azerbaijan, UN document CCPR/CO/73/AZE, para. 14, where the Committee expressed its concern “at the lack of security of tenure for judges”.

¹² Concluding Observations of the Human Rights Committee on Viet Nam, UN document CCPR/CO/75/VNM, para. 10.

¹³ Concluding Observations of the Human Rights Committee on Kyrgyzstan, UN document CCPR/CO/69/KGZ, para. 15.

¹⁴ *UN Basic Principles on the Independence of the Judiciary, op. cit.*, principle 13. Principle A, paragraph 4 (o) of the Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa is identical.

an objective assessment of factors such as competence, integrity, independence and experience”.¹⁵

The *European Charter on the statute for judges* contemplates two systems of promotion of judges: on the one hand, a system based on seniority, under which judges are promoted after spending a fixed time at a post (and are still able to discharge their professional duties); on the other, a system of promotions based on merit, in which improper factors such as race, sex or religious or political affiliation have no role to play. The operative paragraph says: “When it is not based on seniority, a system of promotion is based exclusively on the qualities and merits observed in the performance of duties entrusted to the judge, by means of objective appraisals performed by one or several judges and discussed with the judge concerned. Decisions on promotion are then pronounced by the authority referred to at paragraph 1.3 [an authority independent of the executive and legislative within which at least one half are judges elected by their peers] hereof or on its proposal, or with its agreement. Judges who are not proposed with a view to promotion must be entitled to lodge a complaint before this authority.”¹⁶

Security of tenure for judges constitutes an essential guarantee to maintain judicial independence. Decisions on promotion of judges must be based on the same objective criteria as appointment and must be the outcome of transparent and fair proceedings.

¹⁵ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, op. cit.*, operative paragraph 17.

¹⁶ *European Charter on the statute for judges, op. cit.*, operative paragraph 4.1.

7. ACCOUNTABILITY

Overview

While judicial independence forms an important guarantee, it also has the potential to act as a shield behind which judges have the opportunity to conceal possible unethical behaviour.¹ For this reason, judges must conduct themselves according to ethical guidelines. In order to provide judges with clear rules of conduct, several countries have approved codes of ethics to regulate judicial behaviour.² In some cases, judges have drafted these codes; in other cases, Governments have sought their input. In the international sphere, the *Bangalore Principles of Judicial Conduct* contain the set of values that should determine judicial behaviour. These values, which are reflected in most codes of conduct, are: independence, impartiality, integrity, propriety, equality, competence and diligence. Grounds for removal based on a judge's conduct will normally be based on these principles.

It is worth distinguishing between judicial accountability for the discharge of professional functions, for which there are clear rules of conduct, and accountability for ordinary crimes judges may commit in their private capacity, for which the applicable rules are the same as for other individuals.

International standards on accountability

As a general rule, judges can only be removed for serious misconduct, disciplinary or criminal offence or incapacity that renders them unable to discharge their functions. This should only occur after the conduct of a fair procedure. Judges cannot be removed or punished for *bona fide* errors³ or for disagreeing with a

¹ For a discussion on corruption in the judiciary, see Richard J. Scott, "Towards an ethic to control judicial corruption", in *Strengthening Judicial Independence, Eliminating Judicial Corruption*, CIJL Yearbook 2000, p. 117.

² See, for instance, the *Code of Conduct for United States Judges* and the *Code of Ethics of the Peruvian Judiciary* (Código de Ética del Poder Judicial del Perú).

³ See the Concluding Observations of the Human Rights Committee on Viet Nam, UN document CCPR/CO/75/VNM, para. 10, where the Committee expressed its concern at "the procedures for the selection of judges as well as their lack of security of tenure (appointments of only four years), combined with the possibility, provided by law, of taking disciplinary measures against judges because of errors in judicial decisions."

particular interpretation of the law. Furthermore, judges enjoy personal immunity from civil suits for monetary damages arising from their rulings.⁴

States have a duty to establish clear grounds for removal and appropriate procedures to this end. The determination as to whether the particular behaviour or the ability of a judge constitutes a cause for removal must be taken by an independent and impartial body pursuant to a fair hearing.

The *UN Basic Principles* contain a number of provisions on discipline and removal of judges. Principle 17 states that “A charge or complaint made against a judge in his/her judicial and professional capacity shall be processed expeditiously and fairly under an appropriate procedure. The judge shall have the right to a fair hearing. The examination of the matter at its initial stage shall be kept confidential, unless otherwise requested by the judge.” Principle 18, which deals with the grounds for removal, spells out the permissible categories for removal:

*“Judges shall be subject to suspension or removal only for reasons of incapacity or behaviour that renders them unfit to discharge their duties”.*⁵

Furthermore, the *UN Basic Principles* sanction the obligation on passing legislation to enable judges to appeal disciplinary decisions. Principle 20 stipulates that “Decisions in disciplinary, suspension or removal proceedings should be subject to an independent review”.⁶

These circumstances expose judges to political pressure and jeopardize their independence and impartiality.” (emphasis added)

⁴ See *UN Basic Principles on the Independence of the Judiciary, op. cit.*, Principle 16 establishes that “Without prejudice to any disciplinary procedure or to any right of appeal or to compensation from the State, in accordance with national law, judges should enjoy personal immunity from civil suits for monetary damages for improper acts or omissions in the exercise of their judicial functions”. For other provisions with similar content, see operative paragraph 32 of the *Beijing Principles* and article 10 of the *Universal Charter of the Judge*.

⁵ See also Principle 19, which states that “All disciplinary, suspension or removal proceedings shall be determined in accordance with established standards of judicial conduct”. Operative paragraph 27 of the *Beijing Principles* is identical.

⁶ Principle 20 excludes this requirement in specific cases, namely “decisions of the highest court and those of the legislature in impeachment or similar proceedings”.

It is worth highlighting that the Council of Europe's recommendation on the independence of the judiciary lays down clear guidelines on the grounds that can lead to the removal of a judge:

*"Appointed judges may not be permanently removed from office without valid reasons until mandatory retirement. Such reasons, which should be defined in precise terms by the law, could apply in countries where the judge is elected for a certain period, or may relate to incapacity to perform judicial functions, commission of criminal offences or serious infringements of disciplinary rules."*⁷

Furthermore, the Council has established clear requirements on removal proceedings, in particular the creation of a special body subject to judicial control and the enjoyment by judges of all procedural guarantees:

*"Where measures [on discipline] need to be taken, states should consider setting up, by law, a special competent body which has as its task to apply any disciplinary sanctions and measures, where they are not dealt with by a court, and whose decisions shall be controlled by a superior judicial organ, or which is a superior judicial organ itself. The law should provide for appropriate procedures to ensure that judges in question are given at least all the due process requirements of the [European] Convention [on Human Rights], for instance that the case should be heard within a reasonable time and that they should have a right to answer any charges."*⁸

The *European Charter on the statute for judges* includes detailed provisions on these matters, in particular about the composition of the body that should either direct or intervene in the proceedings,

⁷ Recommendation No. R (94) 12, *op. cit.*, Principle VI.2. The Recommendation also contemplates other sanctions short of removal: "Where judges fail to carry out their duties in an efficient and proper manner or in the event of disciplinary offences, all necessary measures which do not prejudice judicial independence should be taken. Depending on the constitutional principles and the legal provisions and traditions of each state, such measures may include, for instance: *a.* withdrawal of cases from the judge; *b.* moving the judge to other judicial tasks within the court; *c.* economic sanctions such as a reduction in salary for a temporary period; *d.* suspension." (Principle VI.1).

⁸ *Idem*, Principle VI.3.

the procedural guarantees enjoyed by judges and the requirement that sanctions be proportional to the misdeed. Operative paragraph 5.1 states that “The dereliction by a judge of one of the duties expressly defined by the statute, may only give rise to a sanction upon the decision, following the proposal, the recommendation, or with the agreement of a tribunal or authority composed at least as (*sic*) to one half of elected judges, within the framework of proceedings of a character involving the full hearing of the parties, in which the judge proceeded against must be entitled to representation. The scale of sanctions which may be imposed is set out in the statute, and their imposition is subject to the principle of proportionality. The decision of an executive authority, of a tribunal, or of an authority pronouncing a sanction, as envisaged herein, is open to an appeal to a higher judicial authority.”⁹

In the African context, the *Guidelines on fair trial* also include strict criteria for removal when they establish that judges can only be removed if they commit a serious misdeed or if they are incapable of performing their judicial activities. The *Guidelines* establish that: “Judicial officials may only be removed or suspended from office for gross misconduct incompatible with judicial office, or for physical or mental incapacity that prevents them from undertaking their judicial duties”.¹⁰ It is worth mentioning that the *African Guidelines* are the only instrument on the independence of the judiciary to contain a specific prohibition on removing judges for having their rulings reversed:

*“Judges shall not be [...] removed from office or subject to other disciplinary or administrative procedures by reason only that their decision has been overturned on appeal or review by a higher judicial body”.*¹¹

With regard to procedural guarantees in disciplinary proceedings, the *Guidelines* contain the following provision:

⁹ *European Charter on the statute for judges, op. cit.*, operative paragraph 5.1.

¹⁰ *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa, op. cit.*, Principle A, paragraph 4 (p).

¹¹ *Idem*, Principle A, paragraph 4 (n) 2.

*“Judicial officials facing disciplinary, suspension or removal proceedings shall be entitled to guarantees of a fair hearing including the right to be represented by a legal representative of their choice and to an independent review of decisions of disciplinary, suspension or removal proceedings”.*¹²

In the Asia-Pacific region the criteria are similar. According to the *Beijing Principles*, judges can only be removed for incapacity or misconduct: “Judges should be subject to removal from office only for proved incapacity, conviction of a crime, or conduct which makes the judge unfit to be a judge”.¹³ As to the kind of procedure to remove judges as well as to the body entrusted with this prerogative, the *Beijing Principles* are not conclusive and acknowledge that these may change from country to country: “It is recognised that, by reason of differences in history and culture, the procedures adopted for the removal of judges may differ in different societies. Removal by parliamentary procedures has traditionally been adopted in some societies. In other societies, that procedure is unsuitable: it is not appropriate for dealing with some grounds for removal; it is rarely if ever used; and its use other than for the most serious of reasons is apt to lead to misuse.”¹⁴ However, when this prerogative does not fall under parliament or popular vote, removal of judges must be carried out by the judiciary.¹⁵ But irrespective of the body in charge, the right to a fair hearing remains intact.¹⁶

The *Latimer House Guidelines*, which are aimed at Commonwealth jurisdictions, also contain provisions related to judicial discipline and removal. The *Guidelines* specify the causes for removal as well

¹² *Idem*, Principle A, paragraph 4 (q). Paragraph (r) further provides that “[...] Complaints against judicial officers shall be processed promptly, expeditiously and fairly”.

¹³ *Beijing Statement of Principles of the Independence of the Judiciary in the LAWASIA Region, op. cit.*, operative paragraph 22.

¹⁴ *Idem*, operative paragraph 23.

¹⁵ *Idem*, operative paragraph 24. See also operative paragraph 25: “Where parliamentary procedures or procedures for the removal of a judge by vote of the people do not apply and it is proposed to take steps to secure the removal of a judge, there should, in the first instance, be an examination of the reasons suggested for the removal, for the purpose of determining whether formal proceedings should be commenced. Formal proceedings should be commenced only if the preliminary examination indicates that there are adequate reasons for taking them.”

¹⁶ *Idem*, operative paragraph 26: “In any event, the judge who is sought to be removed must have the right to a fair hearing.”

as the procedural guarantees and the characteristics of the body charged with the proceedings. Guideline VI says: “In cases where a judge is at risk of removal, the judge must have the right to be fully informed of the charges, to be represented at a hearing, to make a full defence, and to be judged by an independent and impartial tribunal. Grounds for removal of a judge should be limited to: (A) inability to perform judicial duties; and (B) serious misconduct.”¹⁷ The *Guidelines* also contain a prohibition on public admonitions.¹⁸

International case-law

The Human Rights Committee has referred to removal of judges in a number of occasions, both in the context of its concluding observations on State reports and on individual cases. A reading of the Committee’s observations confirms the provisions of international standards, in that judges should not be removed on grounds other than misconduct or incapacity to continue in their posts and that removal proceedings must be conducted fairly.

- In the case of Sri Lanka, the Committee expressed its concern that “the procedure for the removal of judges of the Supreme Court and the Courts of Appeal [...] is incompatible with article 14 of the Covenant, in that it allows Parliament to exercise considerable control over the procedure for removal of judges” and it went on to recommend that “the State party should strengthen the independence of the judiciary by providing for judicial, rather than parliamentary, supervision and discipline of judicial conduct”.¹⁹
- In the case of Belarus, the Committee noted its concern that “the judges of the Constitutional Court and Supreme Court can be dismissed by the President of the Republic without any safeguards”.²⁰
- In the case of Viet Nam, the Committee urged the State to “ensure that judges may not be removed from their posts unless they are found guilty by an independent tribunal of inappropriate conduct”.²¹

¹⁷ *Latimer House Guidelines, op. cit.*, Guideline VI.1, paragraph (a) (i).

¹⁸ *Idem*, Guideline VI.1, paragraph (a) (iii).

¹⁹ Concluding Observations of the Human Rights Committee on Sri Lanka, UN document CCPR/CO/79/LKA, para. 16.

²⁰ Concluding Observations of the Human Rights Committee on Belarus, UN document CCPR/C/79/Add.86, para. 13.

²¹ Concluding Observations of the Human Rights Committee on Viet Nam, UN document CCPR/CO/75/VNM, para. 10.

- In relation to judicial corruption, in the case of Georgia, the Committee stated that “The State party should also ensure that documented complaints of judicial corruption are investigated by an independent agency and that the appropriate disciplinary or penal measures are taken”.²²
- The Committee has also determined that summary removals are incompatible with the Covenant,²³ and that “judges should be removed only in accordance with an objective, independent procedure prescribed by law”.²⁴

In a case of judges dismissed by a presidential decree on the grounds that they were “immoral, corrupt, deserters or recognized to be incompetent, contrary to their obligations as judges and to the honour and dignity of their functions”, the Human Rights Committee concluded that the judges “did not benefit from the guarantees to which they were entitled in their capacity as judges”. By virtue of these guarantees the judges should have been brought before the Supreme Council of the Judiciary in accordance with the law. Furthermore, the Committee found that “the President of the Supreme Court had publicly, before the case had been heard, supported the dismissals that had taken place thus damaging the equitable hearing of the case”, and concluded that the removal had entailed “an attack on the independence of the judiciary protected by article 14, paragraph 1, of the Covenant”.²⁵

- On the characteristics of disciplinary measures against civil servants, the Committee has stated that, in principle, it “does not of itself necessarily constitute a determination of one's rights and obligations in a suit at law, nor does it, except in cases of sanctions that, regardless of their qualification in domestic law, are penal in nature, amount to a determination of a criminal charge within the meaning of the second sentence of article 14, paragraph 1. [...] While the decision on a disciplinary dismissal does not need to be determined by a court or tribunal, the Committee considers that whenever, as in the present case, a judicial body is entrusted with the task of deciding on the imposition of disciplinary measures, it must respect the guarantee of

²² Concluding Observations of the Human Rights Committee on Georgia, UN document CCPR/CO/74/GEO, para. 12.

²³ Concluding Observations of the Human Rights Committee on The Gambia, UN document CCPR/CO/75/GMB, para. 14.

²⁴ Concluding Observations of the Human Rights Committee on the Republic of Moldova, UN document CCPR/CO/75/MDA, para. 12.

²⁵ Communication N° 933/2000, *Adrien Mundy Busyo, Thomas Osthudi Wongodi, René Sibou Matubuka et. al. v. Democratic Republic of the Congo* (Views adopted on 31 July 2003), UN document CCPR/C/78/D/933/2000, para. 5.2.

equality of all persons before the courts and tribunals as enshrined in article 14, paragraph 1, and the principles of impartiality, fairness and equality of arms implicit in this guarantee.”²⁶ Moreover, in regard to the length of disciplinary proceedings, the Committee considered that “the right to equality before the courts, as guaranteed by article 14, paragraph 1, entails a number of requirements, including the condition that the procedure before the national tribunals must be conducted expeditiously enough so as not to compromise the principles of fairness and equality of arms”.²⁷

For its part, the Inter-American Court of Human Rights has also referred to the issue of removal of judges. In the *Constitutional Court* case, the Court established that judges enjoy all procedural guarantees when facing removal. The case was brought by three judges who had been dismissed as a result of the application of a sanction by the Legislature, in the context of an impeachment proceeding. After noting that “the authority in charge of the procedure to remove a judge must behave impartially in the procedure established to this end and allow the latter to exercise the right of defense”, the Court decided that the judges’ right to a fair trial had been violated because “the impeachment proceeding to which the dismissed justices were submitted did not ensure them guarantees of due legal process and did not comply with the requirement of the impartiality of the judge”.²⁸ Moreover, the Court also ruled that in the specific case of these judges “the Legislature did not have the necessary conditions of independence and impartiality to conduct the impeachment proceeding against the three justices of the Constitutional Court.”²⁹

Judges must conduct themselves according to ethical standards and will be held accountable if they fail to do so. International law clearly establishes that judges can only be removed for serious misconduct or incapacity. Disciplinary proceedings must be conducted by an independent and impartial body and in full respect for procedural guarantees.

²⁶ Communication 1015/2001, *Paul Perterer v. Austria* (Views adopted 20 July 2004), UN document CCPR/C/81/D/1015/2001, para. 9.4.

²⁷ *Ibid.*, para. 10.7

²⁸ *Constitutional Court Case, op. cit.*, paragraphs 74 and 84.

²⁹ *Idem*, para. 84.

B. THE ROLE OF LAWYERS

Introduction

Lawyers are, with judges and prosecutors, one of the pillars upon which human rights and the rule of law rest. Lawyers play an essential role in protecting human rights and in guaranteeing that the right to a fair trial is respected by providing accused persons with a proper defence in court.

In protecting human rights, lawyers play a crucial role in protecting the right against arbitrary detentions by challenging arrests, for example through presenting *habeas corpus*. Lawyers also advise and represent victims of human rights violations and their relatives in criminal proceedings against alleged perpetrators of such violations and in proceedings aimed at obtaining reparation. Furthermore, lawyers are in the best position to challenge before courts national legislation that undermines basic principles of human rights and the rule of law.¹

The right to be represented by a lawyer, even when the person has no financial means to procure one, constitutes an integral part of the right to a fair trial as recognised by international law. Individuals who are charged with a crime must at all times be represented by a lawyer, who will guarantee that his right to receive a fair trial by an independent and impartial tribunal is

¹ See, for example, the principles 4 and 12 of the *United Nations Basic Principles on the Role of Lawyers*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990; the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, articles 1, 9, 11; *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*, Principle 5; *Declaration on the Protection of All Persons from Enforced Disappearance*, article 13; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 6; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Principles 3 and 4; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 11, 12, 15, 17, 18, 23, 25, 32 and 33; *United Nations Rules for the Protection of Juveniles Deprived of their Liberty*, Rules 18, 60 and 78; *United Nations Standard Minimum Rules for the Administration of Juvenile Justice ("The Beijing Rules")*, Rules 7.1 and 15.1; *Standard Minimum Rules for the Treatment of Prisoners*, Rule 93; *International Convention on the Protection of the Rights of All Migrant Workers and Members of Their Families*, articles 17 and 18.

respected throughout the proceedings. Lawyers are the ones who will challenge the court's independence and impartiality and who will ensure that the defendants' rights are respected.²

The independence of lawyers

In order for legal assistance to be effective, it must be carried out independently. This is recognised in the preface to the *UN Basic Principles on the Role of Lawyers* (UN Basic Principles), which states that “adequate protection of the human rights and fundamental freedoms to which all persons are entitled, be they economic, social and cultural, or civil and political, requires that all persons have effective access to legal services provided by an independent legal profession”.³ To this end, international law establishes certain safeguards aimed at ensuring the independence of individual lawyers as well as of the legal profession as a whole.

Essential guarantees for the functioning of the legal profession

For lawyers to carry out their professional functions in an independent manner, it is necessary for States to protect them from any unlawful interference with their work. This interference can range from obstacles to communicating with their clients to threats and physical attacks.

- The *UN Basic Principles* include a set of provisions that establish safeguards in this respect: “Governments shall ensure that lawyers (a) are able to perform all of their professional functions without intimidation, hindrance, harassment or improper interference; (b) are able to travel and to consult with their clients freely both within their own country and abroad; and (c) shall not suffer, or be threatened with, prosecution or administrative, economic or other

² See, for example, the *UN Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 1; *International Covenant on Civil and Political Rights*, article 14, para. 3 (d); *African Charter on Human and Peoples' Rights*, article 7, para. 1 (c); *European Convention on Human Rights*, article 6; *American Convention on Human Rights*, article 8.

³ *United Nations Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 16. Other relevant instruments on the role of lawyers are: the Council of Europe's *Recommendation No. R (2000) 21 of the Committee of Ministers to Member States on the freedom of exercise of the profession of lawyer* and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle I.

sanctions for any action taken in accordance with recognized professional duties, standards and ethics".⁴

- The *Basic Principles* stipulate that "Where the security of lawyers is threatened as a result of discharging their functions, they shall be adequately safeguarded by the authorities".⁵ States shall also take measures to ensure that lawyers involved in the complaint or in the investigation of human rights violations are protected against ill-treatment, intimidations or reprisals.⁶

The Human Rights Committee has referred on a number of occasions to obstacles faced by lawyers in the discharge of their professional functions.

- When examining a new Law on the Bar in Azerbaijan, the Committee concluded that the said law "may compromise lawyers' free and independent exercise of their functions," and recommended the Government to "ensure that the criteria for access to and the conditions of membership in the Bar do not compromise the independence of lawyers".⁷
- In the case of Libya, the Committee noted that serious doubts arose as to "[...] the liberty of advocates to exercise their profession freely, without being in the employment of the State, and to provide legal aid services," and recommended that "measures be taken to ensure full compliance with article 14 of the Covenant as well as with [...] the Basic Principles on the Role of Lawyers".⁸

International law further recognises the need for lawyers to have access to all the relevant information to a case in which they may be involved. Thus, States must "ensure lawyers access to appropriate information, files and documents in their possession

⁴ *Idem*, Principle 16.

⁵ *Idem*, Principle 17.

⁶ See, for example, *Declaration on the Protection of All Persons from Enforced Disappearance*, article 13; *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 15; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Principle 3.

⁷ Concluding Observations of the Human Rights Committee on Azerbaijan, UN document CCPR/CO/73/AZE, para. 14.

⁸ Concluding observations of the Human Rights Committee on the Libyan Arab Jamahiriya, CCPR/C/79/Add.101, para. 14.

or control in sufficient time to enable lawyers to provide effective legal assistance to their clients”.⁹

Another important provision is related to the secrecy of communications between lawyers and their clients. In order for lawyers to effectively represent their clients, the competent authorities must respect this secrecy, which is the cornerstone of the lawyer-client relationship. To this end, the *UN Basic Principles* provide that “Governments shall recognize and respect that all communications and consultations between lawyers and their clients within their professional relationship are confidential”.¹⁰

A possible obstacle to be faced by lawyers is the lack of recognition as such by official bodies, be they courts or others. Except in cases in which the lawyer has been disbarred or disqualified following the appropriate procedures, such bodies must acknowledge the lawyer’s qualifications. The *UN Basic Principles* provide for this recognition when they state that “No court or administrative authority before whom the right to counsel is recognized shall refuse to recognize the right of a lawyer to appear before it for his or her client unless that lawyer has been disqualified in accordance with national law and practice and in conformity with these principles”.¹¹

According to Principle 18 of the *UN Basic Principles*, “Lawyers shall not be identified with their clients or their clients' causes as a result of discharging their functions”. This rule is extremely

⁹ *UN Basic Principles*, Principle 21. This Principle also stipulates that “Such access should be provided at the earliest appropriate time”. See also, the *UN Declaration on the Right and Responsibility of Individuals, Groups and Organs of Society to Promote and Protect Universally Recognized Human Rights and Fundamental Freedoms*, articles 1, 9, 11; *Declaration on the Protection of All Persons from Enforced Disappearance*, article 13 (4); *Principles on the Effective Prevention and Investigation of Extra-legal, Arbitrary and Summary Executions*, Principle 6; *Principles on the Effective Investigation and Documentation of Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment*, Principle 4; *Body of Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, Principles 11, 12, 15 and 17; and *Standard Minimum Rules for the Treatment of Prisoners*, Rule 93.

¹⁰ *UN Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 22. See also *Principles for the Protection of All Persons under Any Form of Detention or Imprisonment*, principles 18 and *Standard Minimum Rules for the Treatment of Prisoners*, Rule 93.

¹¹ *Idem*, Principle 19.

important due to the tendency, in certain countries, to assimilate clients' causes to their lawyers.

- In one report to the UN Commission on Human Rights, the Special Rapporteur on the independence of judges and lawyers noted his concern at “the increased number of complaints concerning Governments' identification of lawyers with their clients' causes. Lawyers representing accused persons in politically sensitive cases are often subjected to such accusations”.¹² The Special Rapporteur concluded that “Identifying lawyers with their clients' causes, unless there is evidence to that effect, could be construed as intimidating and harassing the lawyers concerned”.¹³ According to international law, the Special Rapporteur said, “where there is evidence of lawyers identifying with their clients' causes, it is incumbent on the Government to refer the complaints to the appropriate disciplinary body of the legal profession”.¹⁴

Professional duties

Beyond the protections afforded to them by international law, lawyers have basic professional duties, mostly related to their clients. Thus, Principle 13 of the *UN Basic Principles* establishes the basic obligation of providing legal assistance to the best of their abilities. According to this Principle, this duty includes

“(a) Advising clients as to their legal rights and obligations, and as to the working of the legal system in so far as it is relevant to the legal rights and obligations of the clients; (b) Assisting clients in every appropriate way, and taking legal action to protect their interests; (c) Assisting clients before courts, tribunals or administrative authorities, where appropriate”.

Furthermore, “lawyers shall always loyally respect the interests of their clients”.¹⁵

Besides those particular duties towards the clients they may represent at a given time, lawyers have an obligation towards their colleagues to “at all times maintain the honour and dignity of their

¹² *Report of the Special Rapporteur on the independence of judges and lawyers*, UN document E/CN.4/1998/39, para. 179.

¹³ *Idem*.

¹⁴ *Idem*, para. 181.

¹⁵ *UN Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 15.

profession [...]”¹⁶ It is also incumbent upon lawyers, due to their fundamental role within the administration of justice, to “[...] uphold human rights and fundamental freedoms recognized by national and international law [...]”¹⁷ Lastly, lawyers must “[...] at all times act freely and diligently in accordance with the law and recognized standards and ethics of the legal profession”¹⁸

Freedom of expression and association

As is the case with judges, freedom of expression and association constitute essential requirements for the proper functioning of the legal profession. Although these freedoms are enjoyed by all persons, they acquire specific importance in the case of persons involved in the administration of justice. Principle 23 of the *UN Basic Principles* spells out this freedom in clear terms: “Lawyers like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional restrictions by reason of their lawful action or their membership in a lawful organization. In exercising these rights, lawyers shall always conduct themselves in accordance with the law and the recognized standards and ethics of the legal profession.”

Regarding professional associations of lawyers (or Bar associations), the *UN Basic Principles* establish that “Lawyers shall be entitled to form and join self-governing professional associations to represent their interests, promote their continuing education and training and protect their professional integrity. The executive body of the professional associations shall be elected by its members and shall exercise its functions without external interference.”¹⁹ Furthermore, “Professional associations of lawyers shall cooperate with Governments to ensure that everyone has effective and equal access to legal services and that lawyers are

¹⁶ *Idem*, Principle 12.

¹⁷ *Idem*, Principle 14.

¹⁸ *Idem*.

¹⁹ *UN Basic Principles on the Role of Lawyers, op. cit.*, Principle 24.

able, without improper interference, to counsel and assist their clients in accordance with the law and recognized professional standards and ethics".²⁰ Read together, these provisions clearly establish the duty for States to abstain from interfering in the establishment and work of professional associations of lawyers.

Associations of lawyers are thus created for two main purposes: safeguarding the professional interests of lawyers and protecting and strengthening the independence of the legal profession.

- These associations shall not, as pointed out by the Special Rapporteur, "indulge in partisan politics", which would lead to "compromising the independence of the legal profession". The Special Rapporteur thus made the distinction between "engagement in the protection of those human rights which have political connotations" and "engagement in politics per se".²¹

Apart from banning associations altogether, the most common way in which lawyers' freedom of association is violated is by establishing compulsory affiliation to a State-controlled association or, similarly, to require some form of authorisation from the Executive as requisites for the exercise of their work.

- The Human Rights Committee has referred to these practices in the context of Belarus, where it noted with concern "the adoption of the Presidential Decree on the Activities of Lawyers and Notaries of 3 May 1997, which gives competence to the Ministry of Justice for licensing lawyers and obliges them, in order to be able to practise, to be members of a centralized Collegium controlled by the Ministry, thus undermining the independence of lawyers". After stressing that "the independence of the judiciary and the legal profession is essential for a sound administration of justice and for the maintenance of democracy and the rule of law," the Committee urged the Belarusian Government to "take all appropriate measures, including review of the Constitution and the laws, in order to ensure that judges and lawyers are independent of any political or other external pressure" and, to that end, drew its attention to the *UN Basic Principles on the Role of Lawyers*.²²

²⁰ *Idem*, Principle 25.

²¹ *Report of the Special Rapporteur on the independence of judges and lawyers*, UN document E/CN.4/1995/39, para. 72.

²² Concluding Observations of the Human Rights Committee on Belarus, CCPR/C/79/Add.86, para. 14.

Accountability

As other individuals with public responsibilities, lawyers must conduct themselves according to ethical standards. These codes shall include clear norms of behaviour and the possibility for lawyers to be held accountable in case of misconduct. Thus, Principle 29 of the *UN Basic Principles* provides that “All disciplinary proceedings shall be determined in accordance with the code of professional conduct and other recognized standards and ethics of the legal profession and in the light of these principles”. These codes shall be preferably drafted by associations of lawyers or, in case they are established by law, with the input from these associations. In this respect, the *UN Basic Principles* state that “Codes of professional conduct for lawyers shall be established by the legal profession through its appropriate organs, or by legislation, in accordance with national law and custom and recognized international standards and norms”.²³ In any case, these codes cannot foresee disciplinary measures for carrying out lawful professional duties such as representing a particular client or making a statement in court.²⁴

The *UN Basic Principles* also contain certain basic requirements to be followed in disciplinary proceedings against lawyers so that they conform to international law. These requirements of due process establish that lawyers can only be sanctioned pursuant to a procedure that respects a number of guarantees. Firstly, complaints against lawyers in their professional capacity “shall be processed expeditiously and fairly under appropriate procedures”.²⁵ Furthermore, lawyers shall have “the right to a fair hearing, including the right to be assisted by a lawyer of their choice”.²⁶ As to the characteristics of the body in charge of the

²³ *UN Basic Principles*, Principle 26.

²⁴ See article 85 of the *Draft Universal Declaration on the Independence of Justice (Singhvi Declaration)*, which states that “No lawyer shall suffer or be threatened with penal, civil, administrative, economic or other sanctions by reason of his having advised or assisted any client or for having represented any client's cause”. On immunity for statements, see Principle 20 of the *UN Basic Principles on the Role of Lawyers*, which states that “Lawyers shall enjoy civil and penal immunity for relevant statements made in good faith in written or oral pleadings or in their professional appearances before a court, tribunal or other legal or administrative authority”.

²⁵ *UN Basic Principles on the Role of Lawyers*, *op. cit.*, Principle 27.

²⁶ *Idem*.

proceedings and subsequent appeals, the *Basic Principles* establish that “lawyers shall be brought before an impartial disciplinary committee established by the legal profession, before an independent statutory authority, or before a court, and shall be subject to an independent judicial review”.²⁷

The legal profession plays an essential role in the defence of human rights and the rule of law. Lawyers must be able to work independently and without fear and to freely communicate with their clients. Lawyers must not be identified with their clients' causes and have the right to freely express their opinions and to form associations without any interference. Lawyers must discharge their professional functions according to ethical standards and are accountable for violations of their rules of professional conduct.

²⁷ *Idem*, Principle 28.

C. THE ROLE OF PROSECUTORS

Introduction

Prosecutors play a crucial role in the administration of justice. Respect for human rights and the rule of law presupposes a strong prosecutorial authority in charge of investigating and prosecuting criminal offences with independence and impartiality. Within the prosecuting institution, each prosecutor must be empowered to fulfil his professional duties in an independent, impartial and objective manner.

The *UN Guidelines on the Role of Prosecutors* were formulated to assist States “in their tasks of securing and promoting the effectiveness, impartiality and fairness of prosecutors in criminal proceedings”.¹ The *Guidelines* set forth principles that are applicable to all jurisdictions irrespective of the nature of their prosecuting authority. Thus, the *Guidelines* remain neutral on issues such as appointment procedures and the status of prosecutors within States.

Impartiality and objectivity

States have a duty to ensure that prosecutors can carry out their professional functions impartially and objectively. Unlike with judges and lawyers, international law does not contain a provision that guarantees the institutional independence of prosecutors. This is due to the fact that in some systems prosecutors are appointed by the executive branch of power or are under a certain level of dependency of this power, thus resulting in the duty to observe certain orders received from the Government. Whilst an independent prosecutorial authority is preferable to one that belongs to the executive, States always have a duty to provide

¹ *United Nations Guidelines on the Role of Prosecutors*, adopted by the Eighth United Nations Congress on the Prevention of Crime and the Treatment of Offenders, Havana, Cuba, 27 August to 7 September 1990, hereinafter *UN Guidelines*. Other relevant instruments on the role of prosecutors are the Council of Europe’s *Recommendation No. R (2000) 19 of the Committee of Ministers to member states on the role of public prosecution in the criminal justice system* and the *Principles and Guidelines on the Right to a Fair Trial and Legal Assistance in Africa*, Principle F.

safeguards so that prosecutors can conduct investigations impartially and objectively.

- In the context of Mexico, the Inter-American Commission on Human Rights has referred to the issue of the independence of prosecutors, where it reiterated the proposition that “the Office of the Public Prosecutor must be an organ independent of the executive branch and must have the attributes of irremovability and other constitutional guarantees afforded to members of the judicial branch”.² The Commission also stated that the proper exercise of prosecutorial functions requires “autonomy and independence from the other branches of government”.³

In situations where public prosecutors are physically placed in military bases and they work in close cooperation with military authorities, the Inter-American Commission on Human Rights has considered that “this situation seriously compromises the objectivity and independence of the prosecutor”.⁴

Qualifications, selection and training

The *UN Guidelines* do not specify one type of procedure to be followed in appointing prosecutors. However, and echoing general and specific human rights standards, the *UN Guidelines* contain clear rules on the acceptable criteria for selecting prosecutors. Thus, States, regardless of the proceedings they institute, must ensure that “Persons selected as prosecutors shall be individuals of integrity and ability, with appropriate training and qualifications”.⁵ Furthermore, selection criteria must not be discriminatory and must “embody safeguards against appointments based on partiality or prejudice, excluding any discrimination against a person on the grounds of race, colour, sex, language, religion, political or other opinion, national, social or ethnic origin, property, birth, economic or other status [...]”.⁶

² Inter-American Commission of Human Rights, *Report on the Situation of Human Rights in Mexico*, OEA/Ser.L/V/II.100, Doc. 7 rev. 1, para. 372.

³ *Idem*, para. 381.

⁴ *Third Report on the Human Rights Situation in Colombia*, OAS document OEA/Ser.L/V/II.102, Doc. 9 rev. 1, of 26 February 1999, para. 108.

⁵ *UN Guidelines on the Role of Prosecutors*, *op. cit.*, Guideline 1.

⁶ *Idem*, Guideline 2 (a). As in the case of judges, it is not considered discriminatory to “require a candidate for prosecutorial office to be a national of the country concerned”.

Guarantees for the functioning of prosecutors

In order for prosecutors to discharge their professional functions adequately, international law contains a number of safeguards addressed to States. The most important safeguard is the duty for States to “ensure that prosecutors are able to perform their professional functions without intimidation, hindrance, harassment, improper interference or unjustified exposure to civil, penal or other liability”.⁷ One particularly serious way in which prosecutors may be intimidated is through physical violence. That is why the *UN Guidelines* contain a specific duty on States to protect prosecutors and their families “when their personal safety is threatened as a result of the discharge of prosecutorial functions”.⁸

- In the case of Colombia, the Special Rapporteurs on torture and extrajudicial, summary or arbitrary executions recommended that “effective protection should be provided for all members of the judiciary and the Public Ministry from threats and attempts on their lives and physical integrity, and investigations into such threats and attempts should be carried out with a view to determining their origin and opening criminal and/or disciplinary proceedings, as appropriate”.⁹

Other guarantees for the proper discharge of prosecutorial functions include “reasonable conditions of service, adequate remuneration and, where applicable, tenure, pension and age of retirement”. These requirements “shall be set out by law or published rules or regulations”.¹⁰

Prosecutors, like judges, must be promoted according to objective criteria, in particular “professional qualifications, ability, integrity and experience”, and the procedure leading to promotions must be fair and impartial.¹¹

⁷ *Idem*, Guideline 4.

⁸ *Idem*, Guideline 5.

⁹ *Joint report of the Special Rapporteur on the question of torture and the Special Rapporteur on extrajudicial, summary or arbitrary executions on their visit to Colombia*, UN Document E/CN.4/1995/111, para. 117 (d).

¹⁰ *UN Guidelines on the Role of Prosecutors*, *op. cit.*, Guideline 6.

¹¹ *Idem*, Guideline 7.

Freedom of expression and association

Like judges and lawyers, “prosecutors like other citizens are entitled to freedom of expression, belief, association and assembly. In particular, they shall have the right to take part in public discussion of matters concerning the law, the administration of justice and the promotion and protection of human rights and to join or form local, national or international organizations and attend their meetings, without suffering professional disadvantage by reason of their lawful action or their membership in a lawful organization. In exercising these rights, prosecutors shall always conduct themselves in accordance with the law and the recognized standards and ethics of their profession”.¹²

Regarding freedom of association, Guideline 9 of the *UN Guidelines* includes a provision identical to the one contained in the UN standards applicable to judges, in the sense that “Prosecutors shall be free to form and join professional associations or other organizations to represent their interests, to promote their professional training and to protect their status”.

Professional duties

As essential actors in the administration of justice, prosecutors are entrusted with a number of functions, which they must carry out in an impartial and objective manner and avoiding political, social, religious, racial, cultural, sexual or any other kind of discrimination.¹³ This duty constitutes a guiding principle for the proper discharge of prosecutorial functions and implies that prosecutors shall be free from any bias when carrying out all their professional duties. Furthermore, prosecutors have special duties related to the protection of human rights and to ensuring due process and a correct administration of justice.

- Prosecutors shall, in accordance with the law, perform their duties fairly, consistently and expeditiously, and respect and protect human dignity and uphold human rights, thus contributing to ensuring due process and the smooth functioning of the criminal justice system.¹⁴

¹² *Idem*, Guideline 8.

¹³ *Idem*, Guideline 13, para. (a).

¹⁴ *Idem*, Guideline 12.

Prosecutors need to be watchful of human rights violations that may come to their knowledge, both in terms of investigating them and of evidence. In the latter case, prosecutors have a duty to refuse to take into account evidence “that they know or believe on reasonable grounds was obtained through recourse to unlawful methods, which constitute a grave violation of the suspect's human rights, especially involving torture or cruel, inhuman or degrading treatment or punishment, or other abuses of human rights”. In such cases, prosecutors must inform the Court about the existence of such evidence and “shall take all necessary steps to ensure that those responsible for using such methods are brought to justice”.¹⁵

In case of human rights violations, Public Prosecutors have a duty to ensure a prompt, exhaustive and impartial investigation.

- The Committee against Torture has stated that a Public Prosecutor commits a breach of his duty of impartiality if he fails to appeal for the dismissal of a judicial decision in a case where there is evidence of torture.¹⁶

Prosecutors play an active role in criminal proceedings. Even though their professional functions vary in different legal systems, the basic functions of prosecutors are summarised in Guideline 11 of the *UN Guidelines*: “Prosecutors shall perform an active role in criminal proceedings, including institution of prosecution and, where authorized by law or consistent with local practice, in the investigation of crime, supervision over the legality of these investigations, supervision of the execution of court decisions and the exercise of other functions as representatives of the public interest”.

According to the *UN Guidelines*, “the office of prosecutors shall be strictly separated from judicial functions”. Even though this provision is clear, prosecutors do, in some systems, have certain judicial functions. These may include ordering a preventive detention or collecting evidence. In case they are accepted in the legal system, these functions must always be limited to the pre-

¹⁵ *Idem*, Guideline 16.

¹⁶ Communication N° 60/1996, *Khaled Ben M'Barek v. Tunisia* (Decision of 10 November 1999), UN document CAT/C/23/D/60/1996, para. 11.10.

trial stages of the proceedings and exercised impartially and with respect for the rights of the suspects. These judicial functions must always be subject to independent judicial review.

The Human Rights Committee has dealt with the exercise of judicial functions by prosecutors.

- In a case where a prosecutor who was subordinate to the executive ordered and subsequently renewed a pre-trial detention based on insufficient evidence, the Committee stated that it was not “satisfied that the public prosecutor could be regarded as having the institutional objectivity and impartiality necessary to be considered an ‘officer authorized to exercise judicial power’ within the meaning of article 9(3) [of the International Covenant on Civil and Political Rights]”.¹⁷

One of the crucial provisions related to prosecutors is contained in Guideline 15 of the *UN Guidelines*, which provides that prosecutors “shall give due attention to the prosecution of crimes committed by public officials, particularly corruption, abuse of power, grave violations of human rights and other crimes recognized by international law and, where authorized by law or consistent with local practice, the investigation of such offences”. This provision states the essential position prosecutors play in upholding the rule of law and in applying the law equally to all citizens, particularly to those who hold official positions.

There are systems in which prosecutors have discretionary functions, mainly related to investigating cases and filing charges. In such cases, the *UN Guidelines* provide that “the law or published rules or regulations shall provide guidelines to enhance fairness and consistency of approach in taking decisions in the prosecution process, including institution or waiver of prosecution”.¹⁸

Other prosecutorial duties include: not initiating or halting prosecutions when the charges are unfounded; taking proper account of the position of the suspect and the victim, and paying

¹⁷ Communication N°521/1992, *Vladimir Kulomin v. Hungary*, (Views of 22 of March 1996), UN document CCPR/C/56/D/521/1992, para. 11.3. Article 9.3 of the Covenant stipulates that “Anyone arrested or detained on a criminal charge shall be brought promptly before a judge or other officer authorized by law to exercise judicial power”.

¹⁸ *UN Guidelines on the Role of Prosecutors*, *op. cit.*, Guideline 17.

attention to all relevant circumstances, irrespective of whether they are to the advantage or disadvantage of the suspect; keeping matters in their possession confidential, unless the performance of duty or the needs of justice require otherwise; considering the views and concerns of victims when their personal interests are affected and ensuring that victims are informed of their rights in accordance with the *Declaration of Basic Principles of Justice for Victims of Crime and Abuse of Power*; and cooperating with the police, the courts, the legal profession, public defenders and other government agencies or institutions.¹⁹

Disciplinary proceedings

When they are suspected of having violated their professional duties, prosecutors must be made accountable through disciplinary proceedings. The *UN Guidelines* establish clear criteria on both the grounds for disciplining prosecutors as well as the guarantees enjoyed by them when facing such proceedings.

With respect to the grounds for disciplinary action, the *Guidelines* establish that “disciplinary offences of prosecutors shall be based on law or lawful regulations”.²⁰ These regulations must be clear on which acts constitute misconduct and on the possible sanctions. Even though the *Guidelines* do not explicitly refer to a prosecutor’s incapacity to carry out his or her functions, it is implicit that this constitutes a ground for removal.

The *Guidelines* contain a number of principles that apply to disciplinary proceedings. For example, complaints against prosecutors “shall be processed expeditiously and fairly under appropriate procedures”. Furthermore, prosecutors have the right to a fair hearing and “the decision shall be subject to independent review”.²¹ Lastly, the outcome of the proceedings must be “an objective evaluation and decision”.²²

¹⁹ *Idem*, Guidelines 14, 13 paragraphs (b) to (d) and 20.

²⁰ *Idem*, Guideline 21.

²¹ *Idem*.

²² *Idem*, Guideline 22. The Guideline also says that the disciplinary proceedings “shall be determined in accordance with the law, the code of professional conduct and other established standards and ethics and in the light of the present Guidelines”.

Prosecutors fulfil an essential role in the administration of justice by prosecuting human rights violations and ensuring respect for the right to a fair trial. Prosecutors must carry out their professional functions impartially and objectively. States must ensure that prosecutors are able to perform their functions free of interference and must actively protect them. Prosecutors must pay special attention to crimes committed by public officials and must refuse to use evidence obtained as a result of human rights violations.